The Central Law Journal.

ST. LOUIS, JANUARY 10, 1890.

THE retirement of Mr. Austin Abbott, from the editorial management of the New York *Daily Register*, is an event which we chronicle with deep regret. For thirteen years he has, in the columns of that paper, rendered valuable services to his readers, by the intelligent and vigorous reviews of the work of courts, of legislators and the text-writers. The light which his clear intellect has shed upon many of the obscure subjects of the law, will be greatly missed, not only by the profession at large, but by the legal journals who have from time to time made frequent use of the results of his thought and labor. In conclusion, we express the hope that he may, through other channels, for many years continue to impress his vigorous personality upon the development and study of the law. The following from his valedictory is worthy of reflection:

> The time has gone by when the law can be learned like a matter of ancient history. The records of the past, whether ancient, mediæval or modern, and whether in text-books or annals or reports, can show nothing more than the roots of the law. The law is not in the books. The book gives us what this judge or writer thinks about the law, or did think about it when he wrote. But the law is in the air—it is in the life and force of the community about us, as regulated by the ever developing judgments of judicial power. The books give us approximate statements. But the original thought and fresh observation of the reader must incessantly verify and test what has been written, and cannot help modifying these records of the past in their application to the controversies of the day. The legal journals of our day are rendering a yet too little recognized service in this respect, and to have co-operated in this service has been a pleasure quite as great as any that my readers have found in what I have put before them.

A new departure in English jurisprudence is that which allows cases of a certain nature to be tried in private. Under a recent decision of the Queen's bench, it is in the discretion of the judge, in cases in which both contesting parties are agreed, to try the case with closed doors. It is scarcely probable that such a procedure as this would receive public approval in this country, even if it should be made. There are many cases which come before the courts, the details of which, in the interest of public morals, it would be much better to keep from the public ear. But that the courts of our country should close their doors to any who might enter would not be tolerated for a moment, as a return to the methods of ancient Venice. Publicity in some matters is often unpleasant to the participant, but such publicity is often a wholesome provision, and one which a liberty-loving people would not willingly abridge.

THE Hon. Edward J. Phelps, ex-minister to England, and lecturer on law at Yale College, has turned his attention to the subject of divorce in the United States, with an effort to discover a practical means of lessening the evil. How great that evil is, we have frequently shown by statistics. In an article contributed to the December number of the *Forum*, Mr. Phelps treats the subject from a practical legal point of view, and considers the means whereby the law may be best used as a preventive.

A uniform divorce law in all the States he regards as impossible to obtain, and his view of the federal constitution is that it would be illegal for the United States to enact a law on that subject, it being a matter which falls with in State jurisdiction. He addresses himself therefore to State laws, and after a discussion of the main features of all these laws, reaches the conclusion that the remedy will be found in a prohibition of marriage by either divorced party so long as the other lives. He shows historically, that it is the liberty to marry again that has caused such an increase in divorces; and he concludes that it is the desire for another marriage alliance that is the main cause of most separations between husbands and wives.

STATE taxation as well as State regulations of commerce must be confined to subjects which are clearly within State jurisdiction. This is a doctrine which one would think should have been definitely settled by this time, but only within the past month the Supreme Court of the United States was called upon to reaffirm it in a case com-

ing from Alabama. Under a law passed by the legislature of that State, telegraph companies were taxed not only on business done entirely within the State, but also on messages sent to or received from other States. The supreme court, of course, held the law unconstitutional on the ground that the taxation of the latter class of messages was an interference with interstate commerce. This is the logical outcome of the principle laid down in the Pensacola Telegraph Company's case, that telegraph companies are instruments of commerce, and that their business is commerce itself.

THE oft-repeated assertion of certain prominent newspapers that the United States Supreme Court was packed to reverse the legal tender decision, has at length drawn out an indignant denial from Justice Bradley, who writes:

Mr. Charles S. Sminck—Dear Sir: The vile slander referred to in your letter of the 23d ult. about the supreme court being packed to reverse the legal-tender decision has been so often refuted that it is hardly necessary to notice it again. The story that Judge Strong called on me to ascertain my views is new and purely fictitious. I think I never met Judge Strong until we met as judges of the court. The entire charge that our nomination was made in reference to the legal-tender question is totally false and gratuitous, and is kept on foot by those whose interests, political or pecuniary, are supposed to be promoted by it.

Yours respectfully, JOS. P. BRADLEY.

Washington, Dec. 2, 1889.

NOTES OF RECENT DECISIONS.

THE rule of damages in an action for deceit, as distinguished from an action for breach of contract or warranty, was tersely stated by Chief Justice Fuller in Smith v. Bolles, 10 S. C. Rep. 39. The suit was brought to recover damages sustained by plaintiff by purchasing stock in reliance on fraudulent misrepresentations which defendant was alleged to have made. The trial judge charged that he was entitled to recover the difference between the contract price and what would have been reasonable value if the representations had been true. The chief justice, in the course of his opinion, reversing this, said:

What the plaintiff might have gained is not the question; but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained—such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery. Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf (volume 2, § 256); and "the test is," adds Chief Justice Beasley, in Crater v. Binninger, 33 N. J. Law, 513, "that those results are proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract." In that case the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. And see Horne v. Walton, 117 Ill. 130, 141, 7 N. E. Rep. 100, 103, Slingerland v. Bennett, 66 N. Y. 611; Schwabacker v. Riddle, 84 Ill. 517; Fitzsimmons v. Chapman, 37 Mich. 139.

The New York Register in commenting on this case, says that it was this same distinction in law of damages that gave sharpness to the controversy in the Bric-a-brac case which has just been tried in England, but has not perhaps yet got beyond the newspapers into reports. The purchasers of two vases from a dealer in second hand articles, got them for three or four pounds, when they would have been worth twelve pounds had they been genuine old Chelsea ware as represented; and finding that he had been deceived he sued, expecting to recover the difference in value. The contest, which excited considerable interest in London, turned, in a technical point of view, on whether the plaintiff's evidence made out a warranty and breach, or only a false representation. Be-

fore buying he had asked the dealer if he warranted the vases to be old Chelsea, to which the dealer replied "yes, and there is the guarantee," pointing to a mark or stamp upon them. This mark was in fact false. If the dealer had simply said "yes," plaintiff would have made out his warranty and might perhaps have recovered what he failed to gain by the bargain; but as the dealer added and appealed to the evidence of the truth of his statement, Lord Coleridge held his response was not a warranty, but that it left the buyer to judge himself of the apparent mark.

AN instructive case upon the same subject and one which shows that an important element in the application of the rules as to what constitutes actionable deceit is the question what are matters of fact as distinguished from matters of opinion, is Nounnan v. Sutter County Land Co., Supreme Court of California, 22 Pac. Rep. 515. There the plaintiffs claimed damages for fraudulent representations, in that defendant induced them to undertake the construction of a certain levee by representing that the amount of earth necessary to construct the same was 350,000 cubic yards, and that the earth to be moved was light, sandy loam. They alleged that, upon the faith of these representations, they entered into a written contract to build a levee on defendant's lands by a given date, for which they were to be paid 12 cents per cubic yard of excavation; that in the performance of the work they had moved 400,000 cubic yards of earth, more than half of which was much harder than represented by defendant; and that by reason of the character of such earth it was impossible to complete the levee as they contracted to do. The court held that such representations were expressions of opinion as to matters equally in the power of both parties to ascertain, and the omission of any reference to them in the contract showed that plaintiffs did not regard the same as material; and plaintiffs' continuance of the work after discovering that such representations were false was a waiver of right to contest the contract upon that ground.

THE effect of fraud in inducing defendant to come within jurisdiction in order to serve him with process was considered by the Supreme Court of Oregon in Commercial National Bank v. Davidson, 22 Pac. Rep. 517. The court in overruling the motion to change the venue of the suit says:

The claim by appellant's counsel that there was an abuse of process in the commencement of the suit arises out of the fact that the respondent's counsel represented to the appellant and his counsel that they were coming to Portland to bring a suit in the United States court to adjudicate the question of the lien, and that appellant and his counsel were thereby, in order to save time and unnecessary expense, induced to come to Portland also, to contest an application for a receiver, or give bond if a receiver should be ordered; that a stipulation was signed, entitled in that court, waiving demand for possession; that when appellant arrived in Portland he was almost immediately served with process from the State court. The appellant resided in Malheur county, Oreg., and claims that he should have been sued in the circuit court for that county if sued in the State court, and that it was a deceit in respondent's counsel in so inducing him to come to Portland. I do not think the facts referred to constitute such a deceit as required the circuit court to set aside the service of the summons upon the appellant. It appeared that the respondent's counsel did intend to bring the suit in the United States court, but when he got to Portland he found that that court had no jurisdiction in such a case, and he therefore brought the suit in the State court for Multnomah county. If the statement of the respondent's counsel was made as claimed by the appellant's counsel, it constituted no ground of deceit. As the appellant was bound to know whether the suit could be brought in the United States court or not, he should not have allowed himself to have been deceived by a statement which his counsel would have informed him was untrue. But the deception, if there were any, did not prejudice the appellant. He could not possibly have been injured by being sued in Multnomah county instead of Malheur county. In any equity case where the testimony is taken by deposition it can make very little difference where the suit is brought. In this case all the counsel on both sides, who had the management of the suit after it was begun, resided in Portland, and it is very evident that its commencement there was a convenience to all parties.

THE measure of damages for delay in the delivery of a cipher telegraph message was stated in Abeles v. West. Union Tel. Co., recently decided by the St. Louis Court of Appeals. There it was held that where a message in cipher is delivered to the agent of a telegraph company, without informing him of the meaning of the words nor of the damages which will probably ensue in the case of non-delivery or delay, substantial damages beyond the charges for transmitting the message cannot be recovered. Judge Thompson, who delivered the opinion of the court says:

The question of the liability of a telegraph company for delay in delivering a cipher dispatch, or for the non-delivery of such a dispatch, has never been before the courts of this State so far as we know. We are of opinion that the measure of damages in such a case i

that laid down in the leading case of Hadley v. Baxendale, 9 Exch. 341, which is tha where two parties have made a contract which one of them has broken, the damages which the other ought to recover in respect of such breach of contract, should be either such as may fairly and substantially be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract, as the probable result of the breach of it. Where the agent of a telegaph company receives for transmission a dispatch, the meaning of which is unknown, no consequential damages such as are sought to be recovered in this case, can be fairly regarded as arising naturally, that is, in the usual course of things from a failure to deliver the message; nor can such damages be supposed to have been in the contemplation of the sender of the message and the agent of the company who received it at the time when it was received for transmission.

Re-affirming this doctrine and speaking with reference to a case where the dispatch, though not in cipher, was in terms not calculated to advise the company that extraordinary care or speed was expected in transmitting the dispatch, it was said by Allen, J., in the Court of Appeals of New York: "Whenever special or extraordinary damages, such as would not naturally or ordinarily flow from a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances nnder which, and the knowledge of the parties of the purposes for which it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract." Baldwin v. United States Telegraph Co., 45 N. Y. 744; s. c., 6 Am. Rep. 165, 169. Applying this rule of damages, we find that several authoritative courts have held that in the case of an unreasonable delay in delivering a cipher dispatch the terms of which have not been communicated to the telegraph company, the plaintiff can recover at most nominal damages, or, as some hold, the amount received for transmission. Saunders v. Stewart, 1 C. P. Div. 326; s. c., 35 L. T. N. S., 370; Candee v. Western Union Tel. Co., 34 Wis 471; s. c., 17 Am. Rep. 452; Daniel v. Western Union Tel. Co., 61 Tex. 452; s. c. 48 Am. Dec. 305; Western Union Tel. Co. v. Martin, 8 Bradw. Ill. 587; Behm v. Western Union Tel. Co., 8 Biss. (U. S. 131.)

We have been cited to three opposing decisions Western Union Tel. Co. v. Reynolds, 77 Va. 173; s. c., 46 Am. Rep. 715; Western-Union Tel. Co. v. Way, 83 Ala. 542; s. c., 4 South. Rep. 844; Western Union Tel. Co. v. Hyer, 21 Fla. 637; s. c., 1 Am. St. Rep. 222. These decisions were all rendered by divided courts. They either ignore or seek to restrain the rule of damages laid down in Hadley v. Baxendale, 9 Exch. 341, and they do not commend themselves to our approval. Aside from the reasons which support the rule of damages in Hadley v. Baxendale, there is here a question of public policy to which we could not shut our eyes if we were in doubt upon the question. Under any other rule, where a cipher dispatch is delivered to a telegraph company for transmission and not translated to them, and there is a delay in delivering it or a total failure to deliver it, the door is open for unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and persons to whom it is sent. They can construct any meaning which they may choose, and upon the meaning thus constructed they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit.

While telegraph companies are not common carriers, their duties are analogous to those of common carriers; and the well known rule in regard to the liability of a common carrier in the case of goods of such a peculiar character that extra precautions must be taken in carrying or storing them, that the carrier is not liable for the failure to take such extra precautions where a knowledge of the nature of the goods was not communicated to him. If the shipper wishes to charge the carrier with the peculiar or kind of diligence which the extraordinary nature of the property requires, he is bound in reason and justice to apprise the carrier of the nature of the goods. Upon the same principle it has been suggested that it would be a fair conclusion in a case of this kind, that in order to charge the telegraph company with any extraordinary damages which might accrue for its failure promptly to transmit a cipher message, the sender ought in reason and justice, at least, to apprise the carrier of the translation of the message. In respect of the exact damages to which the plaintiff is entitled on this petition, we incline to think that the proper view is, that where the delay has not been so great as to amount to a substantial failure of the telegraph company to perform the duty which it has undertaken and for which it has been paid, the plaintiff can recover nominal damages only. But where the delay has been so great as to amount substantially to a failure to perform the duty undertaken, we are of opinion that the proper measure of damages in such a case as the one before us is the sum paid for the transmission of the message, with interest. This was the rule of damages laid down by the Supreme Court of Wisconsin in Candee v. Western Union Tel. Co., 34 Wis. 471; s. c., 17 Am. Rep. 452, where there was a total failure to deliver the message.

A CONTRACT to do work to the satisfaction of the employer was inquired into by the New York Court of Appeals in Doll v. Noble, 22 N. E. Rep. 406. It was held that evidence that the employer unreasonably and in bad faith declared himself not satisfied is equivalent to satisfaction, or rather dispenses with the necessity of proving satisfaction. It is noticable in this case that there was conflicting evidence as to whether the work was done according to the contract, but a verdict for plaintiff was upheld notwithstanding the defendant declared himself not satisfied; and that the appellate court put the

solution of the question on the same test that is applied where the stipulation is for the approval of a third person, viz, that fraud or bad faith dispenses with the condition. And the court goes somewhat beyond some of the preceding cases in that they hold that unreasonable refusal is as good a ground as a fraudulent refusal. See also on this subject Chism v. Shipper, 28 Cent. L. J. 160; Sweet v. Morrison, 22 N. E. Rep. 276.

AN important decision on the frequently questioned power of the court to require or allow a jury to amend their verdict is Gaither v. Wilmer, 18 Atl. Rep. 590, decided by the Court of Appeals of Maryland. The action was on a promissory note and an account stated; the defense being a general denial and set-off. The jury were directed to return a sealed verdict, which being brought into court was found to be a finding for the plaintiff, not specifying any amount. The judge told the counsel there was a defect in the verdict, and asked if they would agree that it be corrected. The counsel for the defendant declined to consent. The corrected verdict was thereupon entered, and read to, and assented to by the jury, and the jury were dismissed and dispersed. The court after citing instances in England and even in this country where, in exceptional cases, and by authority of statutes, amendment of verdicts have been made, concludes that in States where the common law is the only guide on the subject, the decided weight of authority is against allowing such a thing to be done; and that no American case can be found in which an amendment like this, in matter of substance, has been made upon affidavits, or from the judge's recollection of what occurred at the trial, after the imperfect verdict has been duly recorded, and the jury have separated. A citation or review of these authorities is unnecessary, because it seems to us that the question has been settled in Maryland by the decisions of its court Macnemara v. Brannock, 4 Har. & McH. 480; Edelen v. Thompson, 2 Har. & G. 31; Ford v. State, 12 Md. 546; Williams v. State, 60 Md. 402. The court says in conclusion that it is firmly convinced that the adoption of any other rule on this subject than that so plainly laid down by our predecessors, and so long adhered to in practice by the courts of the State, would be dangerous in the extreme, would open the door to abuses, and lead to doubtful, and possibly pernicious, results; and we cannot escape the legal conclusion that, by making the amendment complained of in this case, the judge has invaded the exclusive province of the jury, and substituted his verdict for theirs.

CONDITIONAL sales of personal property, their validity and effect, have been a prolific and constant subject of consideration by the Supreme Court of Connecticut. The latest decision, from that court upon the subject is Mack v. Story, 18 Atl. Rep. 707. There liquors were sold and delivered to a retail liquor dealer under an agreement that the title should remain in the seller until they were fully paid for. It was further understood that the purchaser might retail them to customers and that the seller could only enforce the condition of the sale against the portion remaining unsold. The goods were received and a portion was sold to customers. The question was whether the condition was valid and operative as against creditors of the purchaser. The court held that it was, basing their judgment entirely upon the authority of Lewis v. McCabe, 49 Conn. 141, the facts of which, its subject-matter and all its essential provisions being so nearly identical with the present case "as to suggest that the former decision must have been in the minds of the parties when the latter contract was made." The court concludes:

> Our reasoning of course implies that we are well satisfied with that decision; but, however this may be, conditional sales have been too long and too firmly established in this jurisdiction by repeated decisions of this court to be now called in question, or to require further discussion. Since the decision in Lewis v. McCabe, such sales have been distinctly approved by this court in Loomis v. Bragg, 50 Conn. 228; Cooley v. Gilan, 54 Conn. 80, 6 Atl. Rep. 180; Manufacturing Co. v. Bleaching Co., 56 Conn. 70, 13 Atl. Rep. 135; and in the New Haven Wire Company Cases, 16 Atl. Rep. 393. Such sales are also recognized and approved by the necessary implication contained in the provisions of section 920 of our General Statutes, which provides that "any property sold upon condition and put by the vendor into the visible possession of the vendee, unless otherwise exempt from execution may be attached and levied upon, and sold or set out on execution, in any suit against such vendee, subject to the rights of the vendor, to its possession or ownership; and the party attaching or levying shall have the same rights which the vendee would otherwise have had to tender to the vendor performance of the conditions of sale." It will be observed that the statute saves the rights of the conditional vendor in every

case, irrespective of the subject-matter of the sale; which fully answers a suggestion made in the present case, that the doctrine of conditional sales is not applicable to the sale and delivery of property, like that under consideration, which perishes in the using. Were there occasion to seek confirmation of our position as to conditional sales from the courts of other jurisdictions, much more ample support could now be found than existed when Lewis v. McCabe was decided. We have, however, observed a tendency in the States whose courts have held conditional sales valid against the claims of the creditors of the conditional vendee and of purchasers from him, to subject the matter to statutory regulations. Alabama, Iowa, Maine, Missouri, Kentucky, New Hampshire, Nebraska, New York, North Carolina, Ohio, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, and some other States and several territories, require under circumstances somewhat variant, that the contracts be in writing, and recorded. Massachusetts, in the case of conditional sales of household effects of furniture, now requires a written contract, but it need not be recorded. The States of California, Delaware, Kansas, Michigan, Nevada, New Jersey, Oregon, Rhode Island, and Tennessee, and the territories of Montana, New Mexico, Utah, Washington, and Wyoming, require neither writing nor recording.

It is of interest to note that Carpenter, J., who dissented in the case of Lewis v. McCabe also dissents here, delivering an exhaustive opinion, claiming that the case disclosed a sale and delivery, with the agreement that, as between vendor and vendee, the title was to remain in the seller, for the sole purpose of securing payment of the purchase money; that in principle it could not be distinguished from a sale and delivery, accompanied with a retransfer of the title, without possession, as security merely; in legal effect a mortgage; an attempt to create by parol a valid lien on personal property, while ownership for all other purposes, and the possession, remain with the lienor; that this was contrary to the policy of Connecticut law, by which a valid secret mortgage, without possession, has always, as we have before seen, been treated as of no validity as against creditors of the mortgagor. In this dissenting opinion Beardsley, J., who was not upon the court when Lewis v. McCabe was decided, joined. So that the majority opinion although, in effect, only a reaffirmance of Lewis v. McCabe, was upheld, in a divided court, by the authority of three judges, against two.

WHEN MAY A STRANGER INTERVENE IN A SUIT IN EQUITY.

1. Who is a Stranger.
2. When may he Intervene.
3. How may he Intervene.
   a. By Motion.
   b. By Petition.
   c. By Ancillary Original Bill.
4. When may he be Heard upon the Original Issue.

1. *Who is a Stranger.*—A stranger is one who is not interested in the subject-matter or object of the suit. That is, he is not interested in the controversy pending between the parties. He cannot, ordinarily, take any part in the proceedings. Though not interested (directly) in the controversy, the stranger may be indirectly affected by its results. For example—a stranger may own the thing involved in the controversy, and if it has been taken into the possession of the court may intervene to secure it. In such case, he will come in upon a claim of his own distinct from the claim involved in the suit frequently adversely to both plaintiff and defendant. His claim is not by, through or in unison with either of theirs. For this reason an intervenor if he is, strictly speaking, a stranger, can never be a party in the technical sense of the term, and cannot under ordinary circumstances be heard upon the principal issue. In this respect intervening strangers differ radically from intervenors interested in the subject-matter. The latter claim by or in unison with the parties and may be ranged upon one side or the other of the pending issue. They come in really as plaintiffs or defendants. Owing to the complexity of issues in equity, it is often quite difficult to distinguish between those who are really entire strangers and those whose claims are slightly dependent upon or are inseparably connected with the principal issue. Suits for enforcement of a security of administration of a trust fund are really proceedings partly *in rem*, and all persons having liens upon the property being interested in the object of the suit, are proper parties, in the technical sense (though not always essential) and may contest each others claims, and be heard upon the principal issue.

2. *When may he Intervene.*—The circumstances under which a stranger may intervene are very numerous. As a general rule, it

may be said that a stranger owning the specific thing involved in the controversy, if it has been taken into the possession of the court, may intervene to secure it,[1] or to obtain the proceeds of it, if it has been converted into money.[2] Parties claiming a part or the whole of a fund in *custodia legis* may intervene to secure the same,[3] and may do this, under circumstances, even after a decree of distribution has been made.[4] They are not necessarily strangers, but may be interested in the object or subject-matter of the suit. Prior mortgagees may intervene to secure the mortgaged property when seized by the court as against subsequent incumbrancers and creditors.[5] So may all parties having liens upon the property liable to be lost by the suit,[6] as, for example, judgment creditors whose executions have been returned *nulla bona*, or who have otherwise acquired liens.[7] They also are not strangers in the strict sense. In some States general creditors, by virtue of special statutes, may establish liens by filing bills or intervening in the suits of third parties.[8] In innumerable cases, parties holding claims against railroad companies for labor, materials, legal services, etc., essential to the running of the road, furnished within a reasonable time prior to the appointment of a receiver, have been allowed to intervene by petition or otherwise) and secure the payment of their claims out of the net earnings of the road accruing during the receivership, upon the ground that they have equitable liens thereon paramount to the mortgages.[9] A stranger, whose title deeds have been delivered to a master under an order made in a suit to which he is not a party, may intervene and obtain an order that they shall be delivered to him.[10] Strangers whose lands have been sequestered or taken by a receiver may intervene and obtain leave to bring an action of ejectment or other suit for the possession of the same,[11] and it has been held that a stranger dispossessed of land by an officer under a writ of possession issued in a suit between third parties may intervene and obtain a writ of restitution to restore himself to possession.[12] A stranger cannot intervene in equity if he have an adequate remedy at law. He will not ordinarily be allowed to intervene unless the property has been taken, actually or constructively, into the possession of the court. Property is always in possession of the court when it has been taken by an officer, having a precept specifically commanding him to seize it. In such cases the officer cannot be sued for taking the property, without leave of the court under whose orders he acted.[13] When the officer has general instructions merely to seize property of the defendant without any specific property being designated and he seizes property of a stranger, the seizure is his individual act and the stranger can sue the officer in trespass, trover or replevin,[14] subject to the exception that actions of replevin cannot be maintained in the State courts against officers in the

[1] Dan. Ch. Pr. (6th ed.) p. 921; Calvert's Parties in Equity, p. 126; Copeland v. Mape, 2 Ball & B. 66; Martin v. Willis, 1 Fowl. Ex. Pr. (2d ed.) 160; Watson v. Sutherland, 5 Wall. 74.

[2] Fosdick v. Schall, 99 U. S. 235 and Fosdick v. Car Co., *Ib.* 256; Krippendorf v. Hyde, 110 *Ib.* 276.

[3] Duval v. The Farmers' Bank, 4 Gill & J. (Md.) 282; Pelham v. Newcastle, 3 Swans. 290.

[4] Alexander v. Gillespie, 3 Russ. 130, upon petition; Williams v. Gibbes, 17 How. 239, by original bill. See *post* as to intervention by original bill.

[5] Pennock v. Coe, 23 How. 117; Bowles v. Parsons, Dick. 142; Cooper v. Thornton, *Ib.* 72; First Nat. Bank v. Jasper County Bank, 32 N. W. Rep. (Iowa), 400, original action in chancery.

[6] Ketchum v. St. Louis, 101 U. S. 306; County of Yuba v. Adams, 7 Cal. 35; Carter v. City of New Orleans, 19 Fed. Rep. 659; Hayes v. Miles, 9 Gill & J. (Md.) 193.

[7] Am. Bridge Co. v. Heidelback, 94 U. S. 798; Railroad Co. v. Howard, 7 Wall. 392; Meyers v. Fenn, 5 *Ib.* 205; Cook v. Mancius, 5 Johns. Ch. (N. Y.) 89. This was an intervening original bill: Blair v. Puryear, 87 N. C. 101, a subsequent judgment creditor may claim a subsequent lien.

[8] Market Bank v. Hofheimer, 23 Fed. Rep. 13; Wallace's Adm'r. v. Freakle, 27 Gratt. (Va.) 479.

[9] Blair v. St. Louis, 22 Fed. Rep. 471, six mos prior; William's Adm'r. v. Wash. City Vir., Mid. & G. S. R. Co. 33 Gratt. (Va.) 624; Turner v. I., B. & W. Ry. Co., 8 Biss. 315; Atkins v. Petersburg R. Co., 3 Hughes, 307, parties who loaned money for operating expenses, under special circumstances, 22 mos. prior; Taylor v. Phila. & Reading R. Co., 7 Fed. Rep. 377, five mos.; Hale v. Frost, 99 U. S. 389; Douglass v. Cline, 12 Bush, (Ky.) 608, 8 mos.; Miltenberger v. Logansport, 106 U. S. 286, upon receiver's petition; Union Trust Co. v. Souther, 107 *Ib.* 591; Barnham v. Bowen, 111 *Ib.* 777; Cowdrey v. Galveston R. R. Co., 93 *Ib.* 352.

[10] Marriott v. White, 1 Sim. & Stu. 17.

[11] Angel v. Smith, 9 Ves. 335; James v. Dore, Dick. 788; and they cannot bring suits without such leave.

[12] McChord's Heirs v. McClintock, 5 Litt. (Ky.) 305.

[13] Barton v. Barbour, 104 U. S. 126; Searle v. Choate, 25 Ch. D. 723; Crone v. O'Dell, 2 Hog. Ir. Rolls Ct., 144; Angell v. Smith, 9 Ves. 335.

[14] Van Norden v. Morton, 99 U. S. 378; Bradley v. Holloway, 28 Mo. 150; Louthair v. Fitzer, 78 Ind. 449; Gass v. Williams, 46 *Ib.* 253.

United States courts and *vice versa*.[15] Trespass may be brought in a State court against an officer of a United States court who seizes without specific directions a stranger's goods,[16] but trespass is not an adequate remedy in cases where the property has a special value to the stranger. In such cases, and also in all cases where the officer acted under instructions to seize specific property, the stranger's proper remedy is by intervention,[17] either by motion or petition in the original suit or by an intervening or ancillary original bill brought in the same court.

3. *How may he Intervene.* — There are three ways in which a stranger may intervene viz: By motion, by petition and by ancillary original bill.

a. Intervention by Motion.—Those cases in which application may be made by motion are cases "for which no long statement of facts is required." [18] A motion differs from a petition in that it is made *viva voce*, while a petition is in writing.[19] A stranger cannot intervene without special leave of court and he must give notice of his motion before it will be heard,[20] and the title under which he claims must be stated in the notice of the motion.[21] "There does not appear to be any very distinct line between the cases in which" the applications "should be made by motion and those in which they should be made by petition." [22] In Copeland v. Mape,[23] a stranger intervened by motion, supported by affidavit, to have goods belonging to him restored which had been seized. The court referred the question of ownership to a master and upon return of his report ordered the goods restored to the stranger.[24] This case seems very much like Marriott v. White,[25] where the application was by petition.[26] Where the application calls for an order in the nature of a formal decree it is said the application should be by petition.[27]

b. Intervention by Petition.—A petition is the proper method of intervening in cases where a more formal statement of facts is required than in a motion,[28] and new parties are not required [29] to be made, though if the petition were calculated to unduly protract the trial of the principal issue it might not be admitted in all cases.[30] In Marriott v. White,[31] the owner of title deeds which had been delivered to a master by order of the court in a suit between other parties intervened by petition and obtained an order to have them delivered to himself. In innumerable cases parties have intervened by petition to obtain property in *custodia legis* belonging to them or its proceeds or to obtain a share of a fund in chancery or to establish or secure a lien upon property in the custody of the court.[32]

c. Intervention by Ancillary Original Bill.—An original bill, in order to be equivalent to an intervening petition, must be brought in the same court with the original suit, and is called in the United States courts an "ancillary" or dependent bill in equity.[33]

[15] Freeman v. Howe, 24 How. 450; Lammon v. Feusier, 111 U. S. 17,19, per Gray, J. This it is thought might produce a clashing between the two courts.

[16] Buck v. Colbath, 3 Wall. 334; Day v. Gallup, 2 *Ib.* 97.

[17] Watson v. Sutherland, 5 Wall. 74; Krippendorf v. Hyde, 110 U. S. 276.

[18] Calvert's Parties in Equity, p. 127; 2 Dan. Ch. P. & Pr. 1587; Jones v. Roberts, 12 Sim. 189.

[19] 2 Dan. Ch. Pl. & Pr. 1587.

[20] Calvert's Parties in Equity pp. 125, 126; Lord Langdale in Williams v. Douglass, 5 Beav. 85.

[21] *Ibid.*

[22] 2 Dan. Ch. Pl. & Pr. 1587.

[23] 2 Ball. & B. 66.

[24] Angel v. Smith, 9 Ves. 335; and Pelham v. Newcastle, 3 Swans. 290, appear to have been applications by motions.

[25] 1 Sim. & Stu. 17.

[26] See *post*.

[27] 2 Dan. Ch. Pl. & Pr. 1587.

[28] Calvert's Parties in Equity, p. 127; 2 Dan. Ch. Pl. & Pr. 1587.

[29] Hayes v. Miles, 9 Gill & J. (Md.) 193, 198; Gumbel v. Pitkin, 124 U. S. 131, 147. In this latter case Justice Matthews in sustaining a stranger's intervewing petition, said: "The court had before it all the parties together with the property. The remedy was plain, simple and effectual."

[30] Per Archer, J., in Hayes v. Miles, 9 Gill & J. (Md.) 193, 198. How far this exception extends it is difficult to tell. Justice Archer goes on to say, "But we think it may be stated as a general rule that a petition is the proper mode of affecting a fund in equity where no other parties are to be brought in to litigate the application, than such as are, or ought to have been parties to the original bill."

[31] 1 Sim. & Stu. 17.

[32] Fosdick v. Schall, 99 U. S. 235; Fosdick v. Car. Co., *Ib.* 256; Cowdrey v. Galveston R. Co., 93 *Ib.* 352; Hale v. Frost, 99 *Ib.* 389; Union Trust Co. v. Souther, 107 *Ib.* 591; Burnham v. Bowen, 111 *Ib.* 776; Atkins v. Petersburg R. Co. 3 Hughes, 307; Turner v. I. B. & W. Ry. Co., 8 Biss. 315; Blair v. St. Louis, 22 Fed. Rep. 471; Wallace's Admr. v. Freakle, 27 Gratt. (Va.) 479; William's Admr. v. Wash. City, Vir. Mid. & Gt. South. R. Co., 33 *Ib.* 624; Duval v. Farmers' Bank, 4 Gill & J. (Md.) 282; County of Yuba v. Adams, 7 Cal. 35; Alexander v. Gillespie, 3 Russ. 130; Hayes v. Miles, 9 Gill & J. (Md.) 193; Gumbel v. Pitkin, 124 U. S. 131.

[33] Krippendorf v. Hyde, 110 U. S. 276, 285. In the

An intervening or ancillary original bill is, ordinarily, the proper remedy where new parties are to be made. Numerous instances of them might be given.[34] It has been held that intervention must be by an original bill (or action) and cannot be by petition.[35] There are also authorities that intervention cannot be by an original bill but must be by petition in the original suit.[36] By the weight of authorities intervention may be either by petition or by original bill according to circumstances.

4. *When may he be heard upon the Principal Issue.* — It is only in very exceptional cases that one, who is really a stranger, can be heard upon the principal issue. In case of fraud or collusion between the original parties operating to the injury of the stranger, the latter may be heard upon the principal issue. Such is the case where the plaintiff sues upon a fictitious claim and the defendant fraudulently admits it for the purpose of giving the plaintiff a prior fraudulent lien and thus securing his property from creditors. Many instances might be given of interventions in such cases in suits at law where from the necessity of the case the intervenors were heard upon the principal issue and were allowed to show the fraud or collusion between the parties.[37] In several cases creditors have brought suits in equity and have been allowed to show fraud in prior attachment suits at law and to have their own claims established as prior liens.[38] In suits in nature of proceedings *in rem* persons having legal or equitable liens upon the property, are persons interested in the subject-matter or object of the suit and may be heard upon the validity and priority of all other claims.

WILLIAM WEBSTER.

Boston, Mass.

United States court the ancillary bill may be maintained regardless of the citizenship of the parties, because it is equivalent really to an intervening petition in the principal suit.

[34] Kripendorf v. Hyde, 110 U. S. 276; Pennock v. Coe, 23 How. 117; Watson v. Sutherland, 5 Wall. 74; First Nat. Bank v. Jasper County Bank, 32 N. W. Rep. (Iowa) 400, an equitable action.

[35] Mann. v. Flower, 26 Minn. 469. See Hale v. Chandler, 3 Mich. 531.

[36] Smith v. Am. Life Ins. Co., Charke's Ch. (N. Y.) 307; Platto v. Denter, 22 Wis. 482, 485; Endter v. Lennon, 46 *Ib.* 299.

[37] Buckman v. Buckman, 4 N. H. 319; Blaisdell v. Ladd, 14 N. H. 129; Swift v. Crocker, 21 Pick. (Mass.) 241; Davis v. Eppinger, 18 Cal. 378; Speyer v. Ihmels, 21 Cal. 281; M'Cluny v. Jackson, 6 Gratt. (Va.) 96; Smith v. Gettinger, 3 Kelly (Ga.), 140; Blair v. Puryear, 87 N. C. 101. In several of these cases the interventions rested upon express statutes and in others upon general principles. The right to intervene was denied in Lewis v. Harwood, 28 Minn. 428.

[38] Gist v. Davis, 2 Hill (S. Car. Ch.), 335; Heyneman v. Danenberg 6 Cal. 376.

REMOVAL OF CAUSES ON ACCOUNT OF PREJUDICE OR LOCAL INFLUENCE.

The present law upon the subject of the removal of causes into the federal courts on account of prejudice or local influence is to be found in the act of congress of August 13th, 1888.[1] Since the decision made by Justice Harlan, of the United States Supreme Court,[2] there has been some doubt as to the meaning of the law. Judge Harlan decided that no cause was removable on account of prejudice or local influence unless a sum of more than $2,000 was involved. Afterward Judge Maxwell of Nebraska, in the CENTRAL LAW JOURNAL,[3] in an article upon the subject, coincided with Justice Harlan. Judge Harlan wrote the Malone opinion before the act of congress of August 13, 1888, which act, in its title, states that it is one to correct the enrollment of the act of March 3, 1887. The change of phraseology and arrangement gives new ideas as to the meaning of the law, and it may be justly claimed that the Malone case is not supported by the lawyers and judges who have examined into the meaning of the law as it now stands. Before Judge Harlan's decision there were three theories: One, that a cause was not removable unless more than $2,000 were involved; another, that it was not removable unless $500 and upwards were involved; another theory was that whereever the citizenship of the parties, and the prejudice or local influence were made properly to appear, that the amount involved was immaterial. For that reason the middle ground seemed to prevail because many argued that it would seem inappropriate that actions involving very small amounts should be taken into the Federal court, but at the same time, if the prejudice or local influence was made to appear that it seemed just that the case should be removed. For that reason there appeared to be very generally an opinion among lawyers that the amount in controversy should be $500 or upwards.

During the month of October seven cases were presented to Judge Foster, holding the circuit court for the district of Kansas, and he permitted the removal in each of the cases, although they only involved $1,000 each. The cases cited in favor of the proposition of removal were: 1st. The opinion of Judge Jackson,[4] who says con-

[1] See full text of act, 28 Cent. L. J. 113.

[2] Malone v. R. R. Co., 35 Fed. Rep. 625.

[3] Vol. 28, 109.

[4] Whelan v. R. R. Co., 35 Fed. Rep. 849.

cerning the right of removal for local prejudice: "The appliaction for removal was formerly addressed to the State; under the new act it must be applied for to the circuit court, which acts upon the application. No jurisdictional amount is designated or specified as a condition to the exercise of the right of removal, as was required by the former law." This case was decided July 24, 1888, and in the decision the district judge, Welker, concurred.

The next case is Huskins v. R. R. Co.[5] It was on a motion to remand. Judge Key, upon page 507, says: "The fourth clause of section 2, act of March 3, 1887, is wide-reaching in its changes of the law previously existing. It enlarges its scope in almost every direction but one. It does not allow the plaintiff to remove his suit. It embraces all controversies between citizens of different States without regard to amount. It permits or authorizes removal, though some of the defendants may be residents, or citizens rather, of the State in which the plaintiff resides. Any defendant, being a non-resident, may remove the suit. 'It extends to all controversies, without regard to amount; to all suits, whether they can be estimated in dollars and cents.' "

The last paragraph being cited as from Speer on Removal of Causes, page 62. So that up to this point we have Judge Jackson, Judge Welker, Judge Key and Judge Speer, and the decisions were all made before the act of August 13, 1888.

After the last mentioned act was passed Judge Shiras of Iowa delivered the opinion of McDermott v. Ry. Co.,[6] in which he reviews the decision of Judge Harlan and dissents from him in a long and well reasoned opinion. Judge Shiras has in two other cases rendered the same opinion, so that, taken with Judge Foster, of the circuit court, there are six judges who have decided that question, and it appears that until the United States Supreme Court has finally settled the meaning of the law, that the principle must be conceded as established that no amount is necessary in such cases to give the United States circuit court jurisdiction. Judge Harlan is the only judge to the contrary.

As regards the practical side of removals under the act, difficulties arise, principal among which is that it must be made to appear to the judge of the federal court that the applicant will not be able to obtain justice in the State court where the suit is pending, *or in any other State to which the defendant might, under the laws of the State, have the right to remove the cause.* In a State like Kansas, in which there are remote counties with a scanty population, it is a very difficult thing to say that a case in the eastern part of the State, 400 miles distant, could not be tried anywhere in the State without being affected by prejudice or local influence. Supposing that a case was pending in the northeastern county of Kansas, it would be within the range of possibility, for the attorney who resisted the application, to go into the extreme southwestern county and take the affidavit of every voter in the county, and each would say they had never heard of the case, or of the parties litigant, and that it was absolutely impossible that there should be any prejudice or local influence against the applicant in that county. Tested by such an experiment as this it would be possible to defeat every application perhaps that might be made for removal under that law. If the line is to be drawn strictly, the act of congress giving the right of removal is of no value whatever. In reading the cases that are reported we have very feeble insight into the facts concerning the removals. In the seven cases that were removed by Judge Foster in the Kansas federal court, these difficulties had been considered and an application setting forth the difficulties and the facts constituting the prejudice and local influence had been presented and the State court *refused to give a change of venue*, consequently there seemed to be no county in the State to which they could be removed under the State law. The State law of Kansas concerning change of venue is as follows: "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending; or when the judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some court where such objection does not exist."

It seems to be the only safe way if a person designs to remove to the federal court to make an application for a change of venue in the State court, and if the judge of the State court grants it and the conditions are fair there will be no need of a removal to the federal court. The difficulty, however, in the application of such a rule would be that the person hardly knows where he stands in regard to the prejudice or local influence until about the time that the case is called for trial. Then when his motion for a change of venue is overruled he must immediately make application to the United States circuit court, which, if not in session, leaves him remediless because the application must be made to the court and not to the judge. In addition to this the rule has been established in the eighth [our] circuit that the applicant for the removal of a cause must give the other party ample notice, so they can appear and resist the application with affidavits, depositions, or other evidence, as they see fit. This delay means nearly a month, because the opposite party must have time to prepare rebutting affidavits and present himself before the court operates as an additional burden. In the meantime the case may be called in the State court and parties forced to trial, so that taking it altogether it is a very difficult and serious matter to remove a case on account of prejudice or local influence, and the act should be simplified. In addition to that,

[5] 37 Fed. Rep. 504.
[6] 38 Fed. Rep. 529.

when the federal court has ordered the removal, there is no method laid down in the act for further proceedure. Judge Foster directed that a copy of the application for removal, and the finding of the court and decision thereon, should be certified to the State court, which is perhaps the best way to have it done, but when that has been done what do the parties do? There is nothing prescribed in the act of congress as to what application should be made in the court below; there is no provision made for a bond as in all other removal cases, nor any provision for certifying a transcript and filing it on the first day of the next term. In fact, as regards prejudice and local influence, there is no time set for the applicant after the order is made to do anything, and no description given of what he shall do. It would probably be regular for him to take all the original papers from the files in the State court and bring them into the federal court. A transcript of the record might be all right. But suppose there have been two mistrials of the case, or as in one of the cases removed by Judge Foster a long and protracted trial, a verdict, judgment, and then new trial granted, it is a waste of money to send up a transcript of the complete record. As no directions seem to be given, perhaps, as sensible a thing as can be done when the order is given by the United States court is so file in the federal court simply a certified copy of the pleadings, leaving all the other papers, (except the depositions) to remain in the State court. It would appear that congress might, with propriety, be a little more liberal with the law in regard to such removals, because practically as a matter of experience lawyers will find that where in a county they can only get ten men who are willing to swear that justice cannot be obtained in their county, which is a tender matter touching their local pride, you can always find one thousand of the most hot-headed, bigoted and prejudiced citizens ready to swear that the applicant can get justice in their county, they meaning by that, if the applicant is a corporation, that the jury will—to use a western phrase—"down the corporations," because that is their idea of justice. For that reason the law ought to be made simpler, more efficient, and the proceedure more clear.

E. F. WARE.

CONTINGENT DOWER RIGHT — MORTGAGE — FORECLOSURE—SURPLUS.

MANDEL V. McCLAVE.

Supreme Court of Ohio, April 23, 1889.

1. The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively.

2. Where the wife has joined in a mortgage of the husband's lands to secure his debt, upon a judicial sale of the premises she may have the value of her contingent right of dower in the entire proceeds ascertained, and the husband's entire interest therein shall be exhausted to pay the debt before resorting to the interest of the wife therein.

3. The release, in such mortgage, of her contingent right of dower, does not inure to the benefit of the husband's subsequent judgment creditors, and, as against them, the ascertained value of her contingent right of dower in the entire proceeds of the sale will be paid to her out of the balance left when the mortgage debt is paid, before any part thereof will be distributed to them on their judgment.

BRADBURY, J.: The husband of plaintiff in error is still living, and therefore, when his lands were sold by the sheriff, and the proceeds thereof distributed by the order of the court of common pleas, she had only a contingent right of dower therein. This right, the court found, was sold and passed to the purchaser at the sheriff's sale. To this finding she took no exception, being apparently satisfied to have her rights determined by the order of distribution. The proceeds of the sale were $17,600, of which $13,663.37 was consumed in paying the taxes, costs and mortgage liens, about which no contention arose. There then remained a balance of $3,930.63, to be distributed between the wife and the two judgment creditors. Of this sum she claimed $500 in lieu of a homestead. On this claim the court found in her favor, and the amount was paid to her. The defendant McClave excepted to this finding and order of the court, but did not, so far as the record discloses, bring the question to the attention of the circuit court; nor has he presented the matter to this court for review. He will therefore be regarded as acquiescing in the action of the court below respecting it, and the question will not be further noticed here.

The only ruling of the courts below that we are asked to review is that which limited the right of the wife to dower in the proceeds of the equity of redemption. As the fund is large enough to pay in full Lowe's claim notwithstanding the wife's claim may be allowed to its full extent, it follows that he is not interested in the question; but as the claim of the wife, to the extent it may be allowed, will be paid out of funds that would otherwise be distributed to McClave, the contention is confined to them. McClave concedes that the wife is entitled to be endowed of the proceeds of the equity of redemption, while she claims the right to be endowed of the entire proceeds of the land, to be paid, however, out of the proceeds of the equity of redemption. He contends that her release of dower to the mortgagees inures to his benefit; that it was an absolute release of that right in the premises to the extent of the mortgage debt; and that in satisfying the mortgage debt out of the proceeds her interest in so much of the fund as was required for that purpose should be applied equally with that of her hus-

band. Her contention, upon the other hand, is that her contingent interest in the whole premises was pledged, together with the whole interest of the husband therein, for the payment of his debt; that, the debt being his, it was primarily chargeable upon his interest, and that his entire interest in the thing pledged should be applied to pay the debt before resorting to her interest therein. This precise question is new in this State, and we are to solve it by applying to the facts such settled legal and equitable principles as in their nature are applicable and pertinent thereto. If the contingent right of a wife to dower in her husband's real estate is recognized by the laws of the State as property, and if her release of it by joining with her husband in a mortgage to secure his debt is not a technical bar, but, instead, only inures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying in favor of the wife the equitable rule that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity to prevent the application of this equitable rule; they have no claim that property which, as between husband and wife, belongs to the wife, shall be taken without her consent and applied to pay their debts against the husband.

The first question, therefore, to be determined, is whether in this State the contingent right of a wife to dower in her husband's real estate is property having a substantial and ascertainable value. To reconcile all the cases, even in Ohio, on the subject of the nature of the wife's contingent right of dower, or respecting the effect of her release of it by joining with her husband in a conveyance of the real estate to which it attaches, would be impossible. In the cases upon the subject in this or in other States, or in England, almost every shade of opinion can be found. Nowhere is this wide divergence of judicial opinion more clearly set forth than in the dissenting opinion of Judge Johnson, in Black v. Kuhlman, 30 Ohio St. 196, where that able judge reviews the cases in support of the older and more technical rules on the subject. The court, however, took the more liberal, and, as we think, the more reasonable, view of the question. And there seems to be clearly discernable in the Ohio cases a growing tendency to disregard the older and more technical rules of the earlier cases; and this is especially true of the later cases in this State. It is an incontestable fact that, in the estimation of the business world, the contingent right of the wife, during the husband's life, to dower in his real estate, at his death, has a positive and substantial value, and no acuteness of artificial reasoning, founded on technical rules of law, can persuade a prospective purchaser to the contrary. This practical view of the matter has been adopted by the later Ohio cases. Ketchum v. Shaw, 28 Ohio St. 503; Black v. Kuhlman, 30 Ohio St. 196; Unger v. Leiter, 32 Ohio St. 210; Kling v. Ballentine, 40 Ohio St. 391. In Black v. Kuhlman, *supra*, the court held, not only that her contingent right of dower was valuable, but that, during her husband's life, its value could be ascertained with reasonable certainty under tables of mortality, "based on wide and long observations;" and, furthermore, that its value should be thus ascertained, as against mortgagees, in whose mortgages she had not joined, and paid to a subsequent mortgagee to whom by joining with her husband, she had subsequently released it. In Unger v. Leiter, *supra*, the court found the contingent right of the wife to dower to be valuable, and that value, capable of ascertainment "by reference to tables of recognized authority on that subject in connection with the state of health and constitutional vigor of the wife and her husband." In addition to these cases, we have statutory recognition of the property of the wife in her contingent right of dower in the real estate of her husband during his life. 82 Ohio Laws, 14. This statute directs the probate court to ascertain the value of the wife's contingent dower in the real estate of an insolvent debtor, and directs the same to be paid to her. Thus we have the leislature as well as the courts of the State recognizing this right as tangible property capable of being ascertained, and, in a proper case, given to her or to her releasee.

What, then, is the effect of her release of this right by joining with her husband in a mortgage to secure his debt?. Does it inure to the benefit of other persons, who are strangers to the deed, or is its operation restricted to the grantee and his privies? The latter view we think the more reasonable; it accords more nearly with the probable intention of the parties to the instrument. There is no ground to assert that the mortgagee was contracting for the benefit of any one but himself. There is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that particular debt; nor is there, in the terms of the instrument itself, any language importing such intent. If, therefore, the instrument has any such effect, it is the result of some technical rule of law given to the deed of the parties in this respect an operation never, so far as can be gathered from the words of the parties, within their contemplation. Whatever the state of the law may be elsewhere, we think no such technical rule now prevails in Ohio. Some of the earlier cases seem to give it support, but the tendency of the later cases is to limit the operation of the release to the mortgagee and his privies. In Ketchum v. Shaw, 28 Ohio St. 503, a case involving the right of a wife to dower, we find this language used by Judge Wright, (page 506): "She joined in the conveyance of the land, releasing her dower, not absolutely, but only so far as it was necessary to pay the mortgage debt. That done,

everything else remains to her." In Kitzmiller v. Van Rensselaer, 10 Ohio St. 63, it appeared that after the recovery of a judgment against the husband he sold his real estate to a third person, the wife joining in the deed by a release of dower. Afterwards the land was sold under an execution issued on the judgment, whereupon the purchaser ejected the grantee under the deed of the husband and wife. The husband then died, and the wife brought suit for dower against the purchaser at the judicial sale. He sought to defeat her claim for dower by setting up her release to the grantee of the husband; but the court held that the release did not inure to his benefit. On page 64 this language is found: "He cannot make the lease available to him as a grant, for he was not a party to the grant, nor is he in privity with the grantees. The release cannot operate, in behalf of the defendant below, by way of estoppel; for 'a stranger cannot be bound by, nor take advantage of, an estoppel.'" Here the wife had released her right of dower to the grantee of her husband absolutely, — no right of redemption reserved as in a mortgage; yet the court hold that the release is wholly inoperative except in favor of the grantee. Cases can be found in Ohio that conflict with this view, but this irreconcilable conflict leaves us to adopt that view which accords most nearly with that presumed intention of the parties which arises from the nature of the transaction, and a rational construction of the language they have used.

It being established that the contingent right of the wife to dower in her husband's real estate is property, the value of which can be ascertained by the aid of fixed principles, and that her release of it by joining with her husband in a mortgage to secure his debt does not, by reason of any technical rule of law, inure to the benefit of a stranger to the instrument, either by way of grant or estoppel, it remains for the court to determine to what extent equity will protect this right, after the real estate has been converted into money, and the fund is before the court for distribution. The undoubted rule is that, so long as the real estate remains in the husband or his grantee, equity will not interfere in her favor during the life of the husband, but that she must await her husband's death, when her inchoate right will become consummate. When, however, the estate has been sold at a judicial sale, free from her contingent right of dower, whatever right she may have is in the proceeds of the sale, and must be enforced, if at all, by a distribution of the fund. If the plaintiff in error had been seised of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other he would be the principal and she his surety. We think the same principal should be applied to her contingent right of dower. It is property. Its value can be ascertained. More than this, it is a favorite of the law. See authorities collected in 5 Amer. & Eng. Cyclop. Law, 885, note. It is a provision for her support; and when she pledges it for her husband's debt, by joining in a mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has been first exhausted. She is a purchaser. The inception of her right was earlier than that of the creditors. It began with the marriage and seisin of the husband; theirs began when the debt was contracted, but only became a lien from the recovery of the judgment against the husband. This favorite of the law is entitled to protection equal to that accorded to her other property. We are aware that this question has been decided differently in many of the States, but by courts holding views of the nature of contingent dower, and of the effect of the wife's release thereof, widely different from those adopted in this State in relation thereto, and the decisions are therefore of little or no weight here. One Ohio case (Bank v. Hinton, 21 Ohio St. 509) is not in harmony with our view, but the able judge who wrote the opinion in that case rested the decision respecting this point upon the authority of two New York cases (Hawley v. Bradford, 9 Paige, 200, and Bell v. New York, 10 Paige, 49), and entered upon no discussion of the principles necessarily involved therein. The conclusions reached by the court in these two cases in Paige were legitimately drawn from the doctrine which obtains in New York respecting the nature of the contingent right of the wife to dower, and the effect of a release of it by her, by joining with her husband in deed or mortgage; but they by no means follow from the rules laid down in the Ohio cases on the same subject, and therefore those cases cannot be regarded as of sufficient authority to prevent our deducing from the Ohio cases such results as legitimately follow from them. Whether Bank v. Hinton, *supra*, resting as it does upon those cases in Paige, has become a rule of property in this State which we would deem ourselves bound to follow in cases coming within its exact terms, we need not stop now to inquire. The more recent case of Kling v. Ballentine, *supra*, is in accord with our decision here. In that case the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband's life, joined with him in a mortgage of his land to secure his debt, and the court held that, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund; and the principles that underlie and justify the holding of the court in that case are the same which we ap-

ply to the case before us. They are, that the contingent interest of the wife to dower in her husband's real estate is valuable and that her release of it by joining with him in a mortgage to secure his debt is not a technical bar, and inures only to the mortgagee and those claiming under him. It follows, therefore, that the judgment of the circuit court and that of the court of common pleas should be modified so as to give the plaintiff in error the value of her contingent right of dower in the entire fund.

NOTE.—The origin of conferring upon the widow a certain portion of her husband's property is of great antiquity, "concealed in the night of time"—so ancient that neither Coke nor Blackstone can trace its source.[1] Some claim that it is of German origin, others that it sprang up as a part of the local tenure of the Normans.[2] During the development of the English common law the rules respecting dower underwent great modifications. Statutes have also introduced changes.[3] Littleton has enumerated no less than five distinct kinds of dower. However, the common law dower is the only kind of his classes that has ever been known in this country.[4]

Dower is highly favored by the law. It is intended to sustain the widow,[5] and, according to the views of some law writers, to better nurture and educate the children.[6] However, this latter function has been questioned.[7] "There be three things highly favored in law—life, liberty and dower."[8] "Dower is a legal, equitable and moral right, favored in a high degree by the law, and, next to life and liberty, held sacred."[9]

The law respecting dower differs in the various States of the union.[10] Common law dower has never existed, or has been abolished in many States, but other analogous estates exist in its stead; while in other States the common law dower exists, as modified by statutes.[11] Hence, the rules respecting dower are largely local, depending partly upon the interpretation of statutes, and partly upon the common law principles. What might be the dower rights of a wife under a certain state of facts in one State, might be quite different in another.[12]

From the time of the marriage, or of the vesting of the property if it was acquired after the marriage, until the death of the husband at common law, or of divorce, his insolvency, etc., under statutes, dower is considered but a mere *inchoate* right.[13] It is not regarded as a vested right,[14] for it may be taken away at any time before the husband's death,[15] or it may be taken for public use without compensation to her.[16] However, the wife's right to dower has been held a vested right,[17] and a right arising by contract.[18] This dower right being merely *inchoate*, the legislature may change it,[19] although not to enlarge it as against one who has purchased the land from the husband,[20] or to place it ahead of a prior incumbrance.[21]

Dower right has also been characterized an expectancy or possibility,[22] more than a possibility, a contingent interest, not an interest in real estate,[23] not an estate,[24] a mere contingent right.[25]

A wife's dower, therefore, depends on the law in force where the land lies at the date of her husband's death,[26] or on the alienation, if the husband has aliened it.[27] Although *inchoate*, contingent and depending upon certain conditions, it is truly a valuable right,[28] having many of the incidents of property.[29] Many cases hold with the principal case, that its probable present value can be computed.[30] However, some cases deny this, and assert that it has no present value.[31]

Where a mortgage has been given on the land in which the dower right exists, which has been released by the wife, and where the mortgage is in default after the husband's death, the widow may call on his personal representatives to redeem out of the assets of the estate.[32] If the husband, before his death, or any one for him pays off the mortgage, there is dower, as if no mortgage had existed.[33] In case of a foreclosure during coverture, the value of the wife's *inchoate* dower right will be set aside for her out of the surplus.[34] If the mortgage is foreclosed after the

1 Stewart's Husband & Wife, § 245; 1 Scribner on Dower, ch. 1, § 1; Combs v. Young, 4 Yerg. (Tenn.) 218; Hill v. Mitchell, 5 Ark. 608, 610; Wright v. Jennings, 1 Bailey, 277, 278.

2 Wright on Tenures, 192; 4 Kent's Com. 35, n. 3; 1 Scribner on Dower, ch. 1.

3 Stimson Am. Stat. Law, §§ 3200-3282; Wright on Tenures, 191, 193; Scribner on Dower, ch. 1, §§ 5-11; Stewart's Husband and Wife, §§ 6, 247.

4 Littleton, § 51; Scribner on Dower, ch. 1 §§ 26, 30; Stewart's Husband and Wife, § 245.

5 Noel v. Ewing, 9 Ind. 37, 43; Bank v. Sutton, 2 P. Wms. 702.

6 1 Washb. on Real Prop. 146; Coke's Littleton, 30b; 4 Kent's Com. 35; 1 Bright Husband & Wife, 321.

7 Bishop's Married Women, §§ 245, 247.

8 Coke's Littleton, 124 *b*.

9 Per McKean, C. J., in Kennedy v. Nedrow, 1 Dall. (U. S.) 415, 417. See Chew v. Chew, 1 Md. 193, 172, 173; Meigs v. Dimock, 6 Conn. 462; Kate v. Jay, 31 Atk. 576.

10 See Stimson Am. Stat. Law, §§ 3200-3282; Stewart's Husband and Wife, § 247.

11 See 5 Am. & Eng. Encyc. of Law, p. 886, n. 1.

12 See Stewart's Husband and Wife, § 248.

13 Buzick, 45 Iowa, 259, 262, 24 Am. Rep. 740; Wright v. Gelvin, 85 Ind. 128; Stewart's Husband and Wife, § 262.

14 Simon v. Canady, 53 N. Y. 298, 303; 3 Am. Rep. 523.

15 Boyd v. Harrison, 36 Ala. 533; Lucas v. Sawyer, 17 Iowa, 517, 521; Philips v. Disney, 16 Ohio, 639, 634.

16 Moore v. Mayor, 4 Sand. 456, 8 N. Y. 110, 112.

17 Royston, 21 Ga. 161, 172; Russell v. Rumsey, 35 Ill. 362, 372; Dunn v. Sargeant, 101 Mass. 336, 340; Jackson v. Edwards, 7 Paige, 391, 22 Wend. 498, 513, 519; Lawrence v. Miller, 1 Sand. 516, 2 Comst. 245; Sutton v. Askew, 66 N. C. 172, 177, 8 Am. Rep. 500.

18 Johnson v. Van Dyke, 6 McLean, 422, 428. But see *contra*, Boyd v. Harrison, 36 Ala. 533; Norwood v. Marrow, 4 Dev. & B. 442, 450.

19 Thornbury, 18 W. Va. 522, 527; Stewart's Husband and Wife, §§ 22, 248, 262.

20 Lucas v. Sawyer, 17 Iowa, 517, 521.

21 Helphinstine v. Meredith, 84 Ind. 1.

22 Randall v. Kreiger, 23 Wall. 137, 148.

23 Simon v. Canady, 53 N. Y. 293, 303, 13 Am. Rep. 523; Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473.

24 State v. Wincroft, 76 N. C. 38, 39.

25 Johnson v. Van Dyke, 6 McLean, 422, 441.

26 Boyd v. Harrison, 36 Ala. 633; Guerin v. Moore, 25 Minn. 462, 465.

27 O'Ferrall v. Limplot, 4 Iowa, 381; Stewart's Husband & Wife, §§ 248, 262.

28 Miller v. Crawford, 32 Gratt. 287; Bullard v. Briggs 7 Pick. 533, 539, 19 Am. Dec. 292; Simon v. Canady, 53 N. 53 N. Y. 298, 303 13 Am. Rep. 523.

29 Buzick, 44 Iowa, 159, 262, 24 Am. Rep. 740.

30 Buzick, 44 Iowa, 259, 262; Jackson v. Edwards, 7 Paige, 386, 408. See 2 Scribner's Dower, 6, n. 5.

31 Moore v. Mayor, 8 N. Y. 110, 113, 59 Am. Dec. 473; Reiff v. Horst, 55 Md. 42, 49.

32 Mantz v. Buchanan, 1 Md. Ch. 202, 204; Stewart's Husband and Wife, § 261.

33 Swaine v. Perine, 5 Johns. Ch. 482, 493; Eatnuts v. Simonds, 14 Pick. 98, 104.

34 Vreeland v. Jacobus, 19 N. J. Eq. 231, 232; Denton v.

husband's death, or the fund has not been distributed at that time, she has dower in the surplus,[35] which represents the value of the equity of redemption,[36] and in the surplus only.[37] Hence, it follows, that if there is no surplus, dower is gone.[38] After foreclosure all rights in lands are gone.[39] But in order to thus destroy the dower right, the wife must have been duly made a party to the suit.[40]

EUGENE MCQUILLIN.

Nanmy, 8 Barb. 618, 621; Unger v. Leiter, 32 Ohio St. 210.

35 Reiff v. Horst, 55 Md. 42, 47; Thompson v. Lyman, 28 Wis. 266; Stewart's Husband & Wife, § 261.

36 Titus v. Neilson, 5 Johns. Ch. 452, 457; Hinchman v. Stiles, 9 N. J. Eq. 361, 362.

37 State v. Hinton, 21 Ohio St. 509, 515; Van Doren v. Dickerson, 33 N. J. Eq. 388; Matthews v. Duryea, 45 Barb. 69; Reed v. Morrison, 12 Serg. & R. 18, 21; Chaffee Franklin, 11 R. I. 578.

38 Nothingham, 1 Carb. 527; Robinson v. Shacklett, 29 Gratt. 99.

39 Chew v. Farmers, 9 Gill, 361, 375; Mantz v. Buchanan, 1 Md. Ch. 202, 204; Smith v. Jackson, 2 Edw. 28, 35; Matthews v. Duryea, 45 Barb. 69, 70; Hartshorne, 2 N. J. Eq 349, 358.

40 Mills v. Van Vorhies, 20 N. Y. 412, 23 Barb. 125; Denton v. Nanny, 8 Barb. 618, 622; Ross v. Boardman, 22 Hun, 527, 528; Bell v. Mayor, 10 Paige, 49, 56; Ketchum v. Shaw, 28 Ohio St. 503, 506.

JETSAM AND FLOTSAM.

HOW TO INFLICT PUNISHMENT ON A PUPIL.—In the recent English case of Gardner v. Bygrave, which was an action of assault and battery brought by a pupil against his school-master for caning him on the hand, Mr. Justice Mathew made a joke which the Saturday Review regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *a posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have inquired into the plaintiff's employment. "If he worked with his hands, such punishment might seriously interfere with his occupation, Punishment might be inflicted elsewhere"—Whereupon the court asked,—"what if his occupation were sedentary?"

It was ultimately decided that caning on the hand, when properly done and for a proper reason, is lawful.

ILLINOIS STATE BAR ASSOCIATION MEETING.—The thirteenth annual meeting of the Illinois State Bar Association, will be held at Springfield on the fourteenth and fifteenth days of January, A. D. 1890. The annual banquet will be held at the Leland Hotel, on the evening of the fifteenth. The association was founded for the purpose of cultivating the science of jurisprudence, promoting reform in the law, and facilitating the administration of justice. These are matters of high concern to all, but more especially so, to lawyers, upon whom the administration of justice almost entirely rests. To accomplish the purposes of its formation, the association must have the support of the bar generally. It needs the experience of the older members, to direct it in the way of conservative reform. It needs that active energy of the younger members, to give it life and vigor. Several very important questions are likely to be discussed at the approaching session, and it is very desirable that the best thought of the profession should be brought to bear upon them. Besides the papers that will appear upon the regular programme, an opportunity will be given for the reading of volunteer papers, upon such legal propositions or questions as the writers may choose to discuss, Such papers are solicited from members of the bar of the State. It is desirable that they should be as brief and concise in statement and argument as possible.

All members of the bar in Illinois, are respectfully invited to attend the meeting of the association, and participate in its deliberations.

E. CALLAHAN,
President Illinois State Bar Association.

THE COMING CENTENARY OF THE SUPREME COURT'S FIRST SITTING.—The centennial celebration of the first sitting of the United States Supreme Court will be held in New York city on Tuesday, February 4, under the auspices of the General Committeee of One Hundred of the New York State Bar Association. A good deal of the preliminary work has already been done. The public commemorative exercises will be held in the morning at the Metropolitan Opera House, and in the evening there will be a banquet. The folfowing day the Bar Association of the City of New York will give a reception to the Chief Justices and the Associate Justices of the United States Supreme Court.

Ex-President Cleveland will preside at the commemorative exercises. The programme as at present arranged will be as follows:

Invocation by the rector of Trinity Church, the Rev. Morgan Dix.

Introductory remarks by the President of the New York State Bar Association, the Hon. William H. Arnoux.

Address by Mr. William Allen Butler, of New York, on "The Origin and First Organization of the Court."

Address by the Hon. Henry Hitchcock, of St. Louis, on "The Exercise of the Powers of the Court Since Its Organization."

Address by Hon. Thomas J. Semmes, of New Orleans, on "The Personality of the Court."

Address by the Hon. Edward J. Phelps, of Burlington, Vt., on "The Relations of the Court to the Permanent Administartion of Justice in Enforcing the Supreme Law of the Land as the Guarantee of Civil Liberty, Personal Rights, and the Perpetuity of the Union."

Responses by the Court, through the Chief Justice, and, if so ordered by it, any of the Associate Justices."

Address by the President of the United States, the Hon. Benjamin Harrison.

National hymn, "My Country, 'Tis of Thee," all present participating.

Doxology.

Benediction by the senior pastor of the Collegiate Reformed Church.

RECENT PUBLICATIONS.

THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES. By Dr. H. Von Holst, Professor at the University of Freiburg. Translated from the German by John J. Lalor, 1856—1859. Buchanan's Election—End of 35th Congress. Chicago: Callaghan & Company. 1889.

All students of history and most students of law are

familiar with this series, which treats of the constitutional and political history of the United States. Though, as a matter of fact, it partakes more of a political than a constitutional character, except so far as the latter is, in some respects, inseparably connected with the former. The great reputation of its author and his rare ability to intelligently grasp the salient features of a system of government, radically different from his own, makes his observations of special value. Indeed. what he has to say, though in narrative form, is in fact his views and criticism, on the prominent constitutional and political events of this country. The reader will find this volume which treats of events just prior to the war and the engrossing questions which led up to it, of exceptional interest. The Dred Scott case is entertainingly discussed. So also the Lecompton Convention and the admission of new States. The chapter on Lincoln and Douglas is an admirable review of those leaders, their policies and antagonisms.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vols 9. San Francisco: Bancroft Whitney Company, Law Publishers and Law Booksellers. 1889.

This volume contains many cases of interest and value. McDonald v. People, Supreme Court of Illinois has an exhaustive note reviewing the authorities on the subject of misconduct of counsel in argument. Commonwealth v. Brown from the Supreme Court of Massachusetts is instructive on the subject of disqualification of jurors by reason of bias, etc. Appeal of Sharon Railway Company contains an interesting review of the authorities on the subject of eminent domain and condemnation of lands of corporations.

QUERIES ANSWERED.

QUERY NO. 19.

[*To be found in Vol. 29, Cent. L. J. p. 316.*]

From the statement of the case it would seem that the liens were enforcible in the following order, viz: B's seed lien, A's chattel mortgage and then C's thresher lien. We are at a loss to understand why as stated in the query C's thresher lien is "superior to B's lien." The seed lien act was passed before the thresher lien act and the seed must have been furnished and lien thereby acquired before the threshing was done which gave C a lien. Can find no authorities. M.

QUERY NO. 24.

[*To be found in Vol. 29, Cent. L. J., p. 436.*]

Only the specific amounts designated were disposed of. One rule in the construction of wills is that where two clauses are irreconcilable the clause which is posterior in local position shall prevail. See 2 Jarman on Wills, Am. ed. 44. Inasmuch as the testator designated the amount of each part it clearly controlled the general preceding authority "to divide the moneys and securities in their hands." Another rule of construction is that if possible, all parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole. See 1 Redfield on Wills, § 426, and cases cited: Construing this will to mean that the trustees have power to divide into seven parts all the money left in their hands would absolutely render nugatory that portion of the will specifying the amounts of each part. T.

QUERY NO. 25.

[*To be found in Vol. 29, Cent. L. J. p. 436.*]

The right to garnish money in the hands of a sheriff, constable or justice of a peace collected on execution has been the subject of much controversy, and in most of the States such a right has been expressly denied. Drake on Attachment, (6th ed.) §§ 503-506, 510, and cases cited. In a few of the States such procedure is permissible, and there it would seem, on principle, to make no difference whether the levy is made or not, provided the officer still has the money in his hands, upon which garnishment is sought. B.

QUERY NO. 26.

[*To be found in Vol. 29, Cent. L. J. p. 475.*]

Clearly Yes. The decisions now seem to sustain the proposition that a chattel mortgage upon even an unplanted crop, is good as against a purchaser of the real estate. See Jones on Chattel Mortgages, § 143, and cases cited. And see 30 Cent. L. J. 4; 29 Cent. L. J. 543. D.

QUERY NO. 27.

[*To be found in Vol. 29, Cent. L. J. p. 475.*]

The question seems to turn on whether under the Kansas Act, Comp. Laws 1885, ch. 33, § 2261, which allows illegitimate children to inherit from their father whenever they have been recognized by him either notoriously or in writing, the proof is sufficient in this case to sustain either alternative. From the statement it does not appear that he admitted in writing that he was the father of the baby, though he alludes to it in such a way as to justify the inference. We should say that the decision of the question depends entirely upon the proof necessary to bring the case within the statute. G.

HUMORS OF THE LAW.

AN old darkey was under indictment for some trivial offence, and was without counsel. The judge appointed a young lawyer to defend him, who had never tried a case in court.

As he walked forward to consult with his client, the prisoner turned to the judge and said,—

"Yo' Honah, am dis de lawyer what am depointed to offend me?"

"Yes."

"Well," continued the old darkey, "take hit away, Jedge; I pleads guilty."

JUDGE: It would be more respectful to this court, sir, if you would keep your hands out of your pockets. Why do you do so, sir?

DEFENDANT: Just for the novelty of the thing, your Honor.

JUDGE: Novelty! What d' ye mean?

DEFENDANT: Fact is, your Honor, my attorney has had his hands in there so long, I'm tickled to death to get a chance at them myself.

AT the trial of a case, a juryman being absent from his seat, all the others being occupied, a dog looking for his master, quietly took possession of the vacant chair.

"You see, Mr.. ——," said the judge, turning to one of the counsel, "that the jurymen's seats are occupied. are you ready to proceed"

The attorney addressed raised his glasses to his eyes, and after a brief survey of the jury-box replied,—

"Your Honor, that fellow might do for a judge, but I should hate to trust him for a juryman."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Sale. — Where plaintiff sells and delivers lumber to defendant, and by mutual consent the contract is rescinded, and the lumber left in defendant's possession until it is convenient for plaintiff to remove it, and defendant uses some of the lumber, an action of contract for goods sold and delivered will not lie. — *Folsom v. Cornell*, Mass., 22 N. E. Rep. 705.

2. ADMINISTRATION—Widow's Election.— Where a testator gives to his wife all his personal property, as long as she remains his widow, and the property consists only of a homestead and such personal property as would pass to her on his death, under the statute of distributions, she takes under the law, though she acts under the will, a formal renunciation being unnecessary in such case.—*Burgess v. Bowles*, Mo., 12 S. W. Rep. 341.

3. ADMINISTRATION—Settlements.— An executrix who has accounted for the full amount received by the compromise of a note belonging to the estate, for less than its inventoried value is not liable for more than is thus accounted for, where it is shown that the compromise was made in good faith, and that more money was realized thereby than would have been by an attempt to enforce the payment of the note. — *Jacobs v. Jacobs*, Mo., 12 S. W. Rep. 457.

4. ADMINISTRATOR—Appointment. — It is no objection to the appointment of an administrator that the object of the petition was to enable petitioner to file a bill in equity to set aside as fraudulent a deed from deceased to a third person, as How. St. Mich. § 5894, authorizes such a bill in certain cases, and the remedy would be lost without the appointment of an administrator.—*In re Nugent's Estate*, Mich., 43 N. W. Rep. 889.

5. ADMIRALTY — Arrest. — On libel against the master and two mates of a vessel for an assault and battery on libelant by the two mates, who are not in the jurisdiction, where there is no evidence that the master knew of the mate's intention to assault libelant, or could have prevented it, an order of arrest will not be issued without the security usually required in such cases. — *Cole v. Tollison*, U. S. D. C. (S. Car.), 40 Fed. Rep. 203.

6. ADMIRALTY—Wharfage.—Where a ship is compelled by stress of weather to moor to a wharf for safety of itself and timber raft, it thereby subjects itself to a charge for wharfage.—*Heron v. The Marchioness*, U. S. D. C. (Fla.), 40 Fed. Rep. 330.

7. ADMIRALTY — Maritime Liens.— The maritime lien created by collision takes precedence of liens for repairs and supplies, although the latter liens arose prior to the collision.—*The John G. Stevens*, U. S. C. C. (N. Y.), 40 Fed. Rep. 331.

8. ADVERSE POSSESSION—Boundaries.—Where the line between adjoining owners is in doubt, but they only claim ownership to the true line, wherever that may be, no title by adverse possession can arise in either, as against the other.— *Krider v. Milner*, Mo., 12 S. W. Rep. 461.

9. ADVERSE POSSESSION—Continuity.— No title by adverse possession can arise from different entries and holdings of persons between whom there is no privity of estate; nor from several separate entries and holdings by the same person, if the possession of another claimant intervenes, where no one of such holdings is itself of sufficient duration to perfect such a title.—*Ross v. Goodwin*, Ala., 6 South. Rep. 682.

10. ANNUITY—Apportionment. — When an annuity is granted by a will made before Act N. Y. 1875, ch. 542, making annuities created by instruments made after the passage of the act apportionable, but no time is fixed for the payment thereof, it is payable annually after the death of testator, and is not apportionable, and on the death of the annuitant his legal representatives are not entitled to a proportionate part of such annuity for the time elapsed since the last annual payment.—*Kearney v. Cruikshank*, N. Y., 22 N. E. Rep. 580.

11. APPEAL—Practice. — Where a defendant against whom a judgment has been rendered by default, appeals without moving to set aside the default or asking for a new trial, and does not incorporate the evidence in the record, the amount and form of the judgment cannot be questioned in the supreme court. — *Talley v. Gribling*, Ind., 22 N. E. Rep. 723.

12. APPEALABLE ORDER. — A decree perpetually enjoining defendant from entering upon or removing minerals from plaintiff's land, and ordering an account to be taken of minerals already removed therefrom, not being final, is not appealable. — *Keystone Manganese & Iron Co. v. Martin*, U. S. S. C. 10 S. C. Rep. 32.

13. ARREST WITHOUT WARRANT. — Under Pen. Code Tex. art. 322, which provides that a person violating the law by unlawfully carrying arms may be arrested by a peace-officer, without warrant, upon his own knowledge or upon information of some credible person, a peace-officer may arrest the offender, without warrant, upon information of a credible person, though the offender may be in a distant part of the county at the time of the information, and though the arrest may not be immediately made.— *Jacobs v. State*, Tex., 12 S. W. Rep. 408.

14. ATTACHMENT — Bond.—One purchasing property levied on in attachment from a claimant after the levy, but before the sale, can sue for damages on the indemnifying bond given to the officer under Code Miss. § 1754 requiring the officer to take such bond, conditioned to pay the claimant any damages he may sustain by means of the levy. — *Vicksburg Bank v. Little*, Miss., 6 South. Rep. 648.

15. ATTACHMENT—Damages.— Attachment is wrongful where it appears that the affidavit on which it issued, which alleged that these plaintiffs were about to convert their property into money to defraud their creditors, was made by a person having no knowledge as to

how plaintiffs conducted their business, and taking no steps to ascertain whether there was any ground for the writ; that plaintiff's business was prosperous, and their mercantile standing was considered first class; that in conversation with defendants' agent, a few days before the writ issued, plaintiffs expressed their willingness to pay the debt, and suggested several arrangements as to how it could be done. — *Willis v. McNatt*, Tex., 12 S. W. Rep. 478.

16. BANKS AND BANKING— Application of Deposits.—A bank may apply the individual deposit of a partner to the payment of a firm debt.—*Eyrich v. Capital State Bank*, Miss., 6 South. Rep. 615.

17. BONA FIDE PURCHASER.—Elements and facts necessary to constitute one a *bona fide* purchaser of land without notice.—*Wood v. Rayburn*, Oreg., 22 Pac. Rep. 522.

18. BOUNDARIES—Fences.—In an action wherein title is claimed by adverse possession of land bounded by a fence claimed not to be on the true line, it is correct to charge that, if the parties treated and acquiesced in the fence as the true boundary line for a period of fifteen years, then it becomes immaterial where the actual line of the old original survey may have been.—*Green v. Anglemire*, Mich., 43 N. W. Rep. 772.

19. CANCELLATION OF MORTGAGE — Notice. — In an action to rescind an exchange of realty induced by the fraud of the defendant, and for the cancellation of a mortgage, executed by him on the land conveyed to him: *Held*, that the mere occupation of the premises by the plaintiff, who retained possession under agreement with defendant, was not constructive notice of plaintiff's equity to the mortgagee, the plaintiff not having himself discovered the fraud until a month after the execution of the mortgage. — *Matesky v. Feldman*, Wis., 43 N. W. Rep. 733.

20. CARRIERS OF PASSENGERS—Negligence.—Question, upon the facts, of responsibility for the killing of plaintiff's intestate who being thrown from the train was left on the track dazed and unconscious and was run into by another train. — *Cincinnati, etc. Ry. Co. v. Cooper*, Ind., 22 N. E. Rep. 340.

21. CHANGE OF VENUE—Prejudice of Judge.—The fact that the judge before whom defendant is to be tried for perjury, who presided at the trial in which defendant as a witness is alleged to have committed the purjury, remarked after the trial that defendant was "a grand scoundrel," does not show such prejudice as to entitle defendant to have his case transferred to another court as provided by Acts N. C. 1885, c. 63.—*State v. Johnson*, N. C., 10 S. E. Rep. 257.

22. CHATTEL MORTGAGE.— A purchaser claiming title to chattels by purchase from the mortgagor thereof stands in the place of the mortgagor, and cannnot take advantage of a reservation in the mortgage in favor of the mortgagor to sell the goods in the ordinary course of business, on the ground that such reservation is fraudulent, and renders the mortgage void. — *Commercial Nat. Bank v. Davidson*, Oreg., 22 Pac. Rep. 517.

23. CHATTEL MORTGAGE.— Where a chattel mortgage contains an express or implied stipulation that the mortgagor shall retain possession of the property until default in the conditions of the mortgage, and likewise contains a provision "whenever he deems himself insecure," the latter has no right arbitrarily to take possession of the property before default of the mortgagor, but can only take it for just cause, based upon the actual existence of facts constituting a reasonable ground for believing himself insecure. Gen. Laws, 1879, ch. 65 § 2.—*Deal v. D. M. Osborne & Co.*, Minn., 43 N. W. Rep. 835.

24. CHATTEL MORTGAGE— Replevin.—In replevin for attached chattels by one claiming under a chattel mortgage from the debtor, which authorized him to take possession after the default of 30 days, it is error to overlook evidence of an arrangement, made prior to the levy of the writ, between the debtor and the mortgagee, by which the latter was to have immediate possession of the goods, and charge that plaintiff could not recover unless some of the debt secured had become due 30 days prior to suit.—*Hyde v. Shank*, Mich., 43 N. W. Rep. 890.

25. CONFLICT OF LAWS.—A discharge in insolvency granted by a State court, will not bar an action on a judgment rendered in another State, where the judgment creditor is a resident of such other State and was not a party to the insolvency proceedings. — *Bean v. Loryea*, Cal., 22 Pac. Rep. 513.

26. CONSTITUTIONAL LAW—Regulation of Practice of Dentistry.—Chapter 19, Laws 1889, entitled "An act to regulate the practice of dentistry in the State of Minnesota," is constitutional.—*State v. Vandersluis*, Minn., 43 N. W. Rep. 789.

27. CONSTITUTIONAL LAW—Dentists.—Act Ark. April 4, 1887, providing that dentists practising within the State shall, within three months after the passage of the act, obtain certificate from the board of examiners, is a proper exercise of the police power of the State, and is constitutional.—*Gosnell v. State*, Ark., 12 S. W. Rep. 392.

28. CONSTITUTIONAL LAW —Retrospective Operation.— The provision of article 46 of the constitution, prohibiting the general assembly from enacting any local or special law upon certain special subjects, cannot have given to it the retrospective effect of repealing by implication a prior special statute, though it came within the terms of this constitutional inhibition, the same being prospective only.—*Pecot v. Police Jury of St. Mary*, La., 6 South Rep. 677.

29. CONSTITUTIONAL LAW—Special Laws. —Under the general incorporation act of Illinois all railroad corporations whose lines terminated on bordering navigable streams had power to condemn lands at their terminus in order to reach ferries: *Held*, that the proviso in the act of 1877, limiting the right to own and use boats to carry freight and passengers to "such railroad companies as own the landing for such water-craft," was within the prohibition of Const. Ill. art. 4, § 22, forbidding the passage of special laws for granting special or exclusive privileges to any corporation, and could not be upheld on the ground that it classified railroad companies whose roads terminated on bordering rivers into such as then owned a landing place and such as did not.—*Thomas v. Wabash, etc. Ry. Co.*, U. S. C. C. (Ill.,) 40 Fed. Rep. 126.

30. CONTRACT—Carrier.—If the terms of a contract between two railways be agreed upon by correspondence, a limitation or condition inserted in one or more of the communications need not be repeated or referred to in subsequent ones, in order to preserve its force. — *Georgia Railroad and Banking Co. v. Smith*, Ga., 10 S. E. Rep. 235.

31. CONTRACTS—Performance. — Plaintiff, without any previous contract with defendant, deposited in the bank a sum of money, to be paid to him if he should on or before a certain day deposit with the bank certain conveyances of real estate to plaintiff, and other instruments: *Held*, defendant could be entitled to receive and retain the money only by complying within the time with the terms of the deposit of the money. — *Cannon River Manuf'rs Assn. v. Rogers*, Minn., 43 N. W. Rep. 792.

32. CONTRACTS—Conveyance.—The execution and delivery of an instrument purporting to be a contract for the conveyance of real property is sufficiently proved where it appears that the grantor received a part of the money and the securities which were the consideration of the conveyance; that he carried out his part of it by executing a deed pursuant to the contract, which he subsequently reaffirmed by a recital in another deed; and that in his petition in bankruptcy he stated on oath that he owned no real estate nor any interest therein.—*Dent v. Ferguson*, U. S. S. C., 10 S. C. Rep. 13.

33. CORPORATIONS— Negotiable Instruments. — A corporation cannot, in the absence of any general or special law conferring such power, bind itself by indorsing promissory notes for accommodation of the maker, for a consideration paid.—*National Park Bank v. German-American Security Co.*, N. Y., 22 N. E. Rep. 567.

34. COUNTY BONDS—Bona Fide Holders.—In an action on county bonds, where there is evidence that persons from whom plaintiff purchased the bonds and prior holders, were *bona fide* purchasers for value without notice of pendency of a suit to restrain delivery of the bonds, and no evidence that plaintiff was a party to the scheme to have the bonds delivered before the suit was decided, it is proper to charge that ownership of the bonds by any prior holder, under circumstances protecting him against any defense by the county, entitled plaintiff to recover, even if he had knowledge of the suit when he purchased.—*Scotland County v. Hill*, U. S. S. C., 10 S. C. Rep. 26.

35. COURTS—Comity.—While one court will ordinarily, as matter of comity, defer to the opinion of another court of co-ordinate jurisdiction with regard to the validity of a patent, it is too late to call upon it to do so after it has come to a different conclusion, and entered a decree in ignorance of the prior adjudication.—*Consolidated Roller-Mill Co. v. George T. Smith Middlings Purifier Co.*, U. S. C. C. (Mich.), 40 Fed. Rep. 305.

36. CRIMINAL LAW—Character.—Though the charge of the court as to good character of the accused, in its relation to the reasonable doubt was not quite accurate, the inaccuracy was not of sufficient importance to require a new trial.—*Stephenson v. State*, Ga., 10 S. E. Rep. 234.

37. CRIMINAL LAW—Assault—With Intent.—To constitute a secret and malicious assault with a deadly weapon with intent to kill, under Laws N. C. 1887, ch. 32, the assault need not be made in such a manner as tend to conceal from the public the identity of the assailant, but it is sufficient if it is maliciously made, with a deadly weapon, with intent to kill, and in such a manner as to prevent the person assailed from seeing the assailant or repelling the attack.—*State v. Jennings*, N. C., 10 S. E. Rep. 249.

38. CRIMINAL LAW — Malicious Mischief.— Under Pen. Code Cal. § 596, providing that "every person who maliciously exposes any poisonous substance, with intent that the same shall be taken or swallowed" by any animal, the property of another, shall be punished, an information need not state that the act was feloniously done, nor need it specify the poisonous substance, or state that it would kill.—*People v. Keeley*, Cal., 22 Pac. Rep. 593.

39. CRIMINAL LAW — Infamous Offense.—Under the laws of the United States, an infamous crime is one for which the statutes authorize the courts to award an infamous punishment. Its character for being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but on whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment.— *Ex parte McClusky*, U. S. C. C. (Ark.), 40 Fed. Rep. 71.

40. CRIMINAL LAW—Justifiable Homicide.—Upon trial for murder, where the defendant's theory of the case is that, being assaulted by the deceased, he killed him in self-defense, it is error after instructing the jury that in order to prove self-defense "it must appear that the person killed was the assailant, or that the slayer had endeavored to decline any further struggle before the mortal blow was given," to add that "it must appear that the defendant endeavored to decline any further struggle to entitle defendant to an acquittal on the ground of justifiable homicide," since the latter instruction assumes that the defendant was the assailant.—*Ritter v. People*, Ill., 22 N. E. Rep. 605.

41. CRIMINAL LAW—Perjury.—Under St. Mass. 1887, ch. 214, § 60, prescribing the form of policy to be used by fire insurance, and requiring a provision therein that in case of loss "a statement in writing, signed and sworn to by the assured, shall be forthwith rendered to the company, setting forth the value of the property," the oath taken by the policy holder, in pursuance of such provision in his policy, is one "required by law," within the meaning of Pub. St. ch. 205, § 2, defining perjury as the willful false swearing in regard to any matter respecting which an oath is required by law.—*Avery v. Ward*, Mass., 22 N. E. Rep. 707.

42. CRIMINAL LAW—Murder. — On a trial for murder, where it appears that deceased was defendant's wife, but that their marriage had not been made public, and that deceased was *enciente* by defendant, letters from defendant to deceased are admissible in evidence to show the relations between them. — *O'Brien v. Commonwealth*. Ky., 12 S. W. Rep. 471.

43. CRIMINAL LAW—Arson.—On trial for arson, evidence that defendant and his co-indictee were at the store which was burned, after business hours, and some time before the burning; that defendant was seen prowling about the place, taking note of localities and objects; that in conversation with different persons, he made covert threats, "verbal intimations," and "declarations of intention," so called—is admissible, as tending to connect defendant with the burning.—*State v. Crawford*, Mo., 12 S. W. Rep. 554.

44. CRIMINAL PRACTICE—Verdict.—Under Rev. St. Mo. 1879, § 1234, providing that, on trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, whether the defendant be guilty in the first or second degree, a general verdict of guilty, without specifying the degree, is void.—*State v. Jackson*, Mo., 12 S. W. Rep. 367.

45. CRIMINAL PRACTICE — Larceny. — An information for larceny charging that the accused "did feloniously and willfully steal, take, and carry away of the property and from the possession of A Z," etc., is not defective for failing to state that the property was taken without the consent of the owner, and with the intent on the part of the accused to convert the same to his own use.—*State v. Jones*, La., 6 South. Rep. 638.

46. CRIMINAL PRACTICE— Appeal. — Under the law in Mississippi, where defendant is convicted of murder, and sentenced to the penitentiary for life, stay of judgment will not be granted pending appeal, unless he shall give security for jail fees; and, where the sheriff keeps such appellant in the jail without requiring such security, he cannot afterwards recover for his maintenance from the county.— *Board of Supervisors v. Worrell*, Miss., 6 South. Rep. 629.

47. CRIMINAL PRACTICE—Murder.—An instruction that murder in the second degree embraces all cases of murder at common law in which there was no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute, is too abstract a statement of law, and would befog rather than enlighten a jury.—*State v. Mitchell*, Mo., 12 S. W. Rep. 379.

48. CRIMINAL PRACTICE—Murder.— The words "acted together," in an indictment charging that defendant and B acted together in murdering deceased, are surplusage, and not descriptive of the offense; and it is not error to charge that defendant would be guilty if he, "acting by himself or with" B, killed the deceased. —*Watson v. State*, Tex., 12 S. W. Rep. 404.

49. CRIMINAL PRACTICE — Statutes. — Pen. Code Tex. art. 15, providing that, when the punishment for an offense is ameliorated by statute subsequent to its commission, the defendant, upon conviction, must be punished according to the latter enactment, unless he elect to receive the penalty affixed by the former law, does not apply to cases tried before the ameliorating act becomes operative. — *Jenkins v. State*, Tex., 12 S. W. Rep. 411.

50. CRIMINAL PRACTICE — Verdict. — Where a verdict finds defendant "guilty on all the counts contained in the indictment," the fact that some of the counts are bad does not warrant an order arresting judgment, where some are good.—*United States v. Clark*, U. S. D. C. (Mo.), 40 Fed. Rep. 325.

51. DEATH BY WRONGFUL ACT.—Under Civil Code Ky. § 73, providing that an action against a common carrier for an injury to a passenger or other person, or his property, "must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured, or in which he resides," the circuit court of a county in

which neither plaintiff nor defendant or its chief officer resides, and in which the killing did not occur has no jurisdiction of an action against a railroad company for the alleged negligent killing of plaintiff's son. — *Sherrell v. Chesapeake, etc. R. Co.*, Ky., 12 S. W. Rep. 465.

52. DEATH BY WRONGFUL ACT. — The amendment of 1871, act Tenn. 1851 (Thompson & S. Code, §§ 2291, 2292), providing that the right of action which a person who dies from injuries received from another, etc., would have had in case death had not ensued shall pass to his personal representative, etc., did not take away the right of the personal representative to sue, when deceased left a widow; but, if the widow waives her right to sue, the right remains to the personal representative. —*Webb v. East Tennessee, etc. R. Co.*, Tenn., 12 S. W. Rep. 428.

53. DEDICATION—Public Use. — The building of a city hall upon public squares, dedicated as such, to be used for the transaction of city business, with a jail in the basement thereof, would be a use of them foreign to the purpose for which they were dedicated; and the owners of a lot which had been purchased from the town proprietors, and which would be affected by such appropriation, has a remedy in equity to inhibit such use.—*Church v. City of Portland*, Oreg., 22 Pac. Rep. 528.

54. DEDICATION—Public Park —Evidence held not sufficient to constitute a dedication of land to public use as a park.—*Baker v. Venderburg*, Mo , 12 S. W. Rep. 462.

55. DEED—Record.—A recorded deed, executed out of the State, the acknowledgment of which before a notary public is certified under his official seal, takes priority over a deed executed out of the State, which was recorded before the former deed, but the acknowledgment of which before a notary public is not certified under his seal, as required by Gen. St. Ky. ch. 24, § 16, which provides that "deeds executed out of the State may be admitted to record, when the same shall be certified under his seal of office by a notary public," etc.—*Herd v. Cist.*, Ky,, 12 S. W. Rep. 466.

56. DEEDS—Record. — Where an act of sale reserving the special mortgage and vendor's privilege was passed and completed on Saturday, at the hour of the legal closing of the office of the recorder of mortgages, and said act was filed by said recorder for inscription, and the inscription was made on the Monday morning following, without delay: *Held* that this inscription preserved the vendor's privilege as against prior recorded mortgages, as it was seasonably made. — *Way v. Levy*, La., 6 South. Rep. 661.

57. DEEDS— Covenant of Seisin. — At common law, a covenant of seisin is not implied in a deed of real property by the use of the operative words "grant, bargain, sell, convey, and warrant."— *Aiken v. Franklin*, Minn., 43 N. W. Rep. 839.

58. DEED—Evidence.—Under Rev. St. Mo. § 2392, where a deed for property sold on execution contains the names of the parties to and date of the execution, and the date and amount of judgment, it may be shown by evidence *aliunde* that the judgment and execution were special, and against the property sold.—*Hall v. Klepzig*, Mo., 12 S. W. Rep. 372.

59. DETAINER—Writ of Possession.—A writ of possession, obtained by plaintiff after judgment, for the possession of land and for treble rents for its detention, is not fully executed at the time of the making of an order staying execution of the writ and the giving of a bond by defendant, where it appears from the sheriff's return that he had only taken out of the building on the premises in question so much of the personal property levied on by him as was necessary to satisfy plaintiff's money judgment, and that he had been unable to remove the balance. — *Lee Chuck v. Quan Wo Chong Co.*, Cal., 22 Pac. Rep 594.

60. DISTRICT OF COLUMBIA — Form of Government.— Under acts of congress the District of Columbia is a municipal corporation, with a right to sue and be sued, and not a department of the United States government, or a sovereignty. — *Metropolitan R. Co. v. District of Columbia*, U. S. S. C., 10 S. C. Rep 19.

61. DIVORCE— Alimony. — In proceedings for divorce from bed and board the court may adjudge the defendant guilty of contempt for refusal to obey the order for payment of temporary alimony, though there is pending a plea of former adjudication, had in a prior action for divorce between the same parties, wherein defendant denied the validity of the marriage therein alleged, which was of a prior date to the alleged marriage in suit.—*Filer v. Filer*, Mich.. 43 N. W. Rep. 887.

62. DOWER—Election by Widow.—Under Mansf. Dig. Ark. §§ 2583, 2584, and §§ 3594, 2598 as to election of dower where a husband devises land and personalty to his wife she is entitled to 18 months to execute the release; and the former statute applies where the husband makes a settlement other than by will, or where he bequeaths personalty alone, or where a provision is made for the wife by another than the husband.—*Pumphrey v. Pumphrey*, Ark., 12 S. W. Rep. 390.

63. DRAINAGE.—At common law the land owner who drains his land by a ditch emptying into a natural water course is not responsible to the owners of land lower down said water-course for expense they are thereby caused in disposing of the increased volume of water.—*Kankakee Drainage Dist. v. Lake Fork Drainage Dist*, Ill., 22 N. E. Rep. 607.

64. EASEMENT—Injunction.—Where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement for the benefit of the abutting lands of each, and the common benefit of all, and, in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced in equity, at the suit of a purchaser from one of such proprietors, against a purchaser, with notice from another. Injunction, preventing the permanent obstruction of or interference with such a way, is a proper mode of enforcing the agreement.—*Shields v. Titus*, Ohio. 22 N. E. Rep. 717.

65. EASEMENTS — Irrevocable License. — Where an agreement to erect gates and maintain division of a right of way over the land has been fully complied with, and the way used for over 30 years, the license becomes irrevocable.—*Nowlin v. Whipple*, Ind., 22 N. E. Rep. 669.

66. EJECTMENT. — In ejectment, where defendant relies on adverse possession, evidence that plaintiff's grantor claimed the property; that she had paid the taxes thereon; that defendant held an adjoining piece, as her tenant, with which the lot in controversy communicated; and that defendant had repeatedly admitted that he held the property in question as her tenant,—supports a verdict in plaintiff's favor. — *Von Glahn v. Brennan*, Cal., 22 Pac. Rep. 596.

67. ELECTIONS — Canvassing Board. — Where the returns of an election are regular in form, and genuine, a canvassing board may not reject and refuse to canvass them on the ground that illegal votes had been received, or other frauds or irregularities practiced at the election.—*Brown v. Jeffries*, Kan., 22 Pac. Rep. 578.

68. ELECTION OF MUNICIPAL BOARD. — Under the charter of the city of Knoxville, § 3, the board of mayor and aldermen is composed of nine aldermen. By § 4, the mayor cannot vote, except in case of a tie. Section 5 provides that a majority of the board shall form a quorum. An ordinance provides that any vacancy on the board of education shall be filled by an election by the mayor and aldermen. At such an election eight of the aldermen and the mayor were present. Complainant received four votes, there were three scattering votes, and one blank. The mayor did not vote, but declared complainant elected: *Held*, that a majority of the eight aldermen present was necessary to elect complainant, and the blank vote must be counted to show that he did not receive such majority. — *Lawrence v. Ingersoll*, Tenn., 12 S. W. Rep. 422.

69. EMINENT DOMAIN—Married Women. —By the laws of Colorado, a married woman, being emancipated from the thraldom of coverture, may do what she will with her own property, the same as any other individual. Her enfranchisement brings to her corresponding responsibilities. To the extent she is *sui juris*, she is subject to the law of estoppel. — *Colorado Cent. R. R. Co. v. Allen*, Colo., 22 Pac. Rep.605.

70. EQUITY—Partnership. — On bill for an accounting complainant alleged that he was formerly a partner with defendants, and on his retiring from the firm a certain amount was set aside to abide the result of existing or threatened litigation, his copartners paying him a sum which they represented to be in full of his remaining interest; that he was not personally familiar with the affairs of the firm, but had accepted said sum on the representation of his copartners, who had deceived and defrauded him; and that he was entitled to his share of the reserved fund, as the same was not needed for the purpose designated: *Held*, that the bill sets out a substantial fraud, and a right to an accounting.—*Shaw v. Chase*, Mich., 43 N. W. Rep. 883.

71. ESTOPPEL—Conveyance. — Though the agent who conveyed to defendant the right to cut a ditch through certain land had no written authority to convey, so that defendant acquired no legal title to the easement, yet it acquires an equitable title thereto where the grantor receives the purchase money, retains it for several months, and allows defendant to expend money in constructing the ditch, such conduct operating to estop her to deny defendant's title.— *Franklin v. Pollard Mill Co.*, Ala., 6 South. Rep. 685.

72. ESTATES IN REVERSION.—Rev. St. Ind. 1881, § 2473, providing that an estate which has come to intestate by conveyance in consideration of love and affection, shall, if intestate die whithout children or their descendants, revert to the grantor if living, relates wholly to the descent and distribution of such estate, and does not reserve to the grantor in such conveyance an estate, in reversion.—*Wingate v. James*, Ind., 22 N. E. Rep. 735.

73. EVIDENCE— Insanity. — Where the testimony in support of the defense of insanity, on a trial for murder, tends to show hereditary insanity, permanent insanity produced by long-continued use of alcoholic spirits, *delirium tremens*, and temporary insanity produced by an overdose of morphine, a charge that mentions only one of such forms of insanity—*delirium tremens*—is sufficient though it concludes with the statement that "insanity is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary, and from whatever cause produced."—*State v. Rippy*, N. C., 10 S. E. Rep. 259.

74. EVIDENCE — Ratification of Contract.—Where, in *assumpsit* for towing defendant's barge, the only question under consideration is whether there has been a ratification of an unauthorized towage contract, evidence that the voyage was injurious to the barge is irrelvant.—*Botsford v. Plummer*, Mich., 43 N. W. Rep. 766.

75. EXECUTION—Irregularity.—Under Code Ga. § 4172, providing that in all cases where no appeal lies or none is entered, a justice of the peace shall issue execution on a judgment after the expiration of four days (Sundays excepted), the issuance of an execution within the four days is only an irregularity, and cannot be taken advantage of in a collateral proceeding or by any one except the judgment debtor.—*Knoxville City Mills Co. v. Lovinger*, Ga., 10 S. E. Rep. 230.

76. EXECUTION—Priority.— An officer having in his hands executions against the same defendant may properly apply the proceeds of a sale under the last one to the payment of them all, in the order in which they were received.—*Bank of Sheboygan v. Trilling*, Wis., 43 N. W. Rep. 830.

77. EXECUTION— Stay. — Where, for the purpose of staying execution of a judgment of conviction pending an appeal, application is made to the judge of a lower court, as provided by Pen. Code Cal. § 1243, for a certificate that there is probable cause for the appeal, such certificate should be granted if the judge thinks that the case presented is debatable,—if it is a case in which there may be an honest difference of opinion,—and not simply a case that is vexatious and frivolous.—*In re Adams*, Cal., 22 Pac. Rep. 547.

78. EXPERT EVIDENCE—Surveyor. —A surveyor's testimony, as a man of science, is inadmissible without proof of the *data* on which it is based.—*Jones v. Lee*, Mich., 43 N. W. Rep. 855.

79. EXPERT EVIDENCE.—Whether a witness offered as an expert possesses the requisite qualification is a question of fact to be decided by the trial judge, and his ruling will not be reversed unless it clearly appears that it was not justified by the evidence as presented to him at the time, or that it was based upon some erroneous view of legal principles.—*Stevens v. City of Minneapolis*, Minn., 43 N. W. Rep. 842.

80. FALSE REPRESENTATIONS—Limitation.—The cause of action for false and fraudulent representations, made as an inducement to the purchase of a mortgage, accrues when the sale is completed; and under Code Civil Proc. N. Y. §§ 380, 382, governing actions upon a contract, obligation, or liability, express or implied, such action must be brought within six years thereafter.— *Miller v. Wood*, N. Y., 22 N. E. Rep. 553.

81. FEDERAL COURTS — Replevin. — Property in the hands of the sheriff under execution from a State court is in the custody of the law, and cannot be taken by the marshal on process in a replevin suit in the United States court.—*Pickett v. Filer & Stowell Co.*, U. S. C. C. (Fla.,) 40 Fed. Rep. 313.

82. FEDERAL COURTS — Jurisdiction. — Although Act Cong. March 3, 1887, authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property, located in the State, of a non-resident defendant, without personal service on him, and in the absence of voluntary appearance, the subjection of such property to a judgment *in rem*, Rev. St. U. S. §§ 914, 915, authorizing the practice and modes of procedure in federal courts to be conformed to those of the respective States wherein such courts are held, and authorizing the same remedies by attachment as are provided by the laws of those States do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings *in rem* against the property of a non-resident defendant, who has not been personally served or appeared. — *Harland v. United Lines Tel. Co.*, U. S. C. C. (Conn.), 40 Fed. Rep. 308.

83. FRAUDS—Statute of.—*Held:* under the facts that two papers in defendant's handwriting, bearing the same date and referring to the same transaction, constituted one instrument. — *Coe v. Tough*, N. Y., 22 N. E. Rep. 550.

84. FRAUDS—Statutes of—Leases.—An alleged extension of a lease of two sections of land did not refer to the former lease, nor depend upon it. New lessees were introduced, and only one of the sections of land was included. The terms were changed, and longer time and new privileges granted. *Held:* in an action by the lessor to recover the land, that it was not an extension, but a new contract, and, being within the statute of frauds, was not binding, unless signed by the lessor.—*Bullis v. Noyes*, Tex., 12 S. W. Rep. 397.

85. FRAUDULENT CONVEYANCES.—A plaintiff in ejectment, who claims under an execution sale on a judgment against the common source of title, cannot avail himself of a decree, in a suit to which he was not a party, adjudging that the deed from which defendants derives his title was a fraud upon the rights of creditors.—*Bell v. Wilson*, Ark., 12 S. W. Rep. 328.

86. GAMBLING—Arrest.—Under Rev. St. Wis. § 2689, subd. 1. providing for the arrest of defendant in an action for wrongfully taking, detaining, or converting property, the defendant, in an action brought under

section 4532, for the recovery of money lost in gambling, may be arrested, where the affidavit for arrest alleges the unlawful taking, detention, and conversion of the money.—*Stoddard v. Burt*, Wis., 43 N. W. Rep. 737.

87. GARNISHMENT—Bank.— Where a bank is the garnishee, it is not compelled to hunt up, at its peril, the possible holders of its negotiable paper, or to pay any person but the holder. — *Karp v. Citizens' Nat. Bank*, Mich., 43 N. W. Rep. 680.

88. GUARDIAN AND WARD—A guardian having assumed the relation of parent to his ward is not entitled to any allowance for the latter's maintenance.— *Otis v. Hall*, N. Y., 22 N. E. Rep. 563.

89. HIGHWAY—Mandamus.— Under Rev. Stat. Ill. 1889, ch. 121, § 2 and § 71, the commissioners of highways may be compelled by *mandamus* to remove an impassible obstruction from an existing public highway, the word "may" in the statute being construed "must," and the only discretion vested in the commissioners being as to the character of the notice.— *People v. Commissioners*, Ill., 22 N. E. Rep. 596.

90. HIGHWAY— Obstruction. — One whose only means of ingress and egress to his lots is by means of the intersection of two public streets, one of which passes in front of the lots, but extends but a short distance beyond, can recover of a railroad company for keeping the intersection blocked with cars, so as to interfere with the approach to the lots, and injure the rent of the houses thereon.—*Jackson v. Keil*, Colo., 22 Pac. Rep. 504.

91. HOMESTEAD—Mortgages.—Where a mortgage upon the homestead and other real estate is being foreclosed, the mortgagor has the right, as against the mortgagee and all other creditors and lienholders whose rights are not prior or superior to those of the holder of the mortgage, to require that before the homestead shall be resorted to for the purpose of satisfying the mortgage debt all the other mortgaged property shall first be exhausted.—*Frick Co. v. Ketels*, Kan., 22 Pac. Rep. 580.

92. HUSBAND AND WIFE— Remainder. — The marital rights of a husband to the property of his wife do not attach absolutely to her remainder interest before the death of the life-tenant; and, in case of the death of the husband before termination of the life tenancy, the wife retains the right to the remainder but an assignment of the wife's remainder interest by the husband, during the life-tenancy, bars all his rights therein after the termination of the life-estate.—*De Vanghn v. McLeroy*, Ga., 10 S. E. Rep. 211.

93. IMMIGRATION—Contract Labor.—The petitioner, an immigrant from Switzerland, arrived at Castle Garden, October 18, 1889. On examination by the proper officers, he stated, and signed an affidavit, in substance, that he was engaged by contract to work for a silk manufacturer at Patson, N. J., which being reported to the collector, he was directed to be sent back in accordance with the provisions of the act of February 23, 1887: *Held*, that, the proceedings being regular in every respect, the petitioner could not be released on *habeas corpus*, on the mere ground that his statements in regard to the contract were untrue.—*In re Dietze*, U. S. D. C. (N. Y.), 40 Fed. Rep. 324.

94. INFANCY—Judgment.— A judgment rendered upon default against an infant over 14 years of age, after service of summons upon him, but without the appointment of a guardian *ad litem*, is erroneous and voidable, but not void. — *Eisenmenger v. Murphy*, Minn., 43 N. W. Rep. 784.

95. INSURANCE- Amendment.—In *assumpsit* on an insurance policy, amendment to the declaration, which alleges an oral contract of insurance, and an agreement for delivery of a policy in accordance therewith, and that defendant did not deliver the policy as agreed, but through mistake or fraud, and without plaintiff's consent, delivered a different policy, states a new cause of action.—*Connecticut Fire Ins. Co. v. Judge*, Mich., 43 N. W. Rep. 871.

INSURANCE—Assignment.—A plaintiff who declares as owner of the property insured, and holder of the policy, as such, cannot recover where it appears that he assigned the policy to an intending purchaser of the property, reserving the right to the insurance to the extent of his interest in the property, though the purchaser transferred all his interest in the property and the policy to the plaintiff before he brought the action. — *Bonefant v. American Fire Ins. Co.*, Mich., 43 N. W. Rep. 682.

97. INSURANCE—Application. — Where the question in an application for insurance, "What title has the applicant to these premises?" is answered, "Homestead," it is not a representation that the applicant has an absolute title in fee, and is not such a misrepresentation as would avoid the policy, though the title is still in the United States, as the insurer knows. — *St. Paul F. & M. Ins. Co. v. Neidecken*, Dak., 43 N. W. Rep. 696.

98. INSURANCE— Waiver of Conditions. — A statement by an insurance agent, who has authority simply to solicit applications, and not to issue policies, that mortgages on the insured property would not invalidate the policy, made to the applicant at the time of the application, does not estop the company to claim a forfeiture for a violation of a provision of the policy that if the property is mortgaged without written consent indorsed on the policy by the company's superintendent, the policy shall be void.—*Smith v. Continental Ins. Co.*, Dak., 43 N. W. Rep. 810.

99. INSURANCE—Equitable Interest.— Under a stipulation avoiding an insurance policy on a building in case the insured is not the sole and unconditional owner of the land on which the building is in fee-simple the policy is valid, though the insured has but an equitable interest, being in possession under a contract of purchase from the owner in fee, and having paid part of the purchase money.—*Duprean v. Hibernia Ins. Co.*, Wis., 43 N. W. Rep. 585.

100. INTERSTATE COMMERCE ACT—Discrimination.—To an application for a *mandamus* to compel a carrier to transport relators' stock in the cars of a certain live-stock transportation company, the respondent set forth that it had entered into a contract with another transportation company, by which that company was to furnish respondent a certain number of cars per year; that such cars were available to all shippers of stock; that they were much more useful to defendant than other live stock cars, in that they could be converted into coal-cars when not used for live-stock; and that defendant paid mileage for the use of the cars. *Held*, that the refusal to transport relators' stock in the cars offered at the same rates charged for stock in the other cars was not an "unjust discrimination" in favor of the transportation company, whose cars respondent was using, within the meaning of the interstate commerce act, as the circumstances and conditions were not substantially similar.—*United States v. Deleware, etc. R. Co.*, U. S. C. C. (N. Y.), 40 Rep. 101.

101. INTOXICATING LIQUORS—Interstate Commerce.—A railroad company receiving packages of whisky consigned by a person without to a person within the State of Iowa, after the expiration of from six to fifteen days from the receipt of the various packages at the point of destination, is no longer a carrier, but becomes a warehouseman, and the liquors, if intended for illegal sale, may be seized in its freight depot and confiscated.—*State v. Creeden*, Iowa, 43 N. W. Rep. 673.

102. INTOXICATING LIQUORS—Constitutional Law.—The Texas act prohibiting the selling of malt liquors without having posted in a conspicious place in the house wherein the occupation is pursued a license issued by the county clerk, is not in conflict with Const. Tex. art. 16, § 20, conferring upon counties, cities, towns, and justice's precincts the right of prohibiting the sale of intoxicating liquors.—*Bell v. State*, Tex., 12 S. W. Rep. 410.

103. JUDGMENT—Execution.—Under §§ 276 and 281, subd. 2, Code Or., a judgment creditor, whose judgment was recovered against the debtor during the life time of

the latter, is entitled to have an execution issued on the judgment against the property of the debtor, or for the delivery of real or personal property, notwithstanding the death of such debtor.— *Bower v. Holladay*, Oreg., 22 Pac. Rep. 553.

104. JUDGMENT BY DEFAULT. — Upon the facts stated the judgment by default should have been set aside and defendant allowed to answer.—*Benedict v. Spenddiff*, Mont., 22 Pac. Rep. 500.

105. JUDGMENT—Nunc pro Tunc Entry. —A *nunc pro tunc* entry of judgment on an official bond takes effect as of the date for which it is entered, as against creditors of the defendant, who have in the meantime obtained judgment for pre existing debts.—*Leonard v. Broughton*, Ind., 22 N. E. Rep. 731.

106. JUDGMENT BY CONFESSION.—Under Rev. St. Wis. § 2896, relating to the confession of judgment, an affidavit which states that it was made by the affiant as attorney of the plaintiff, he not being a resident of the county wherein the action is brought, and that the facts stated in the complaint are true, the amount due on the note being one of them, is sufficient as against one who claims goods by conveyance from the debtor after the levy of an execution issued upon the judgment so confessed.—*Rogers v. Cherrier*, Wis., 43 N. W. Rep. 828.

107. JURY — Impeaching Verdict. — Jurymen are not permitted to impeach their own verdict by direct testimony that they acted upon improper and illegal motives, much less can their declarations that they so acted be proved by others, and particularly by a fellow-juror.—*State v. Morris*, La., 6 South. Rep. 639.

108. JUSTICES OF THE PEACE — Jurisdiction. —Under How. St. Mich. ch. 283, a justice of the peace has no jurisdiction of an action against a commissioner of highways.—*Commissioner of Highways v. Commissioner of Highways*, Mich., 43 N. W. Rep. 870.

109. LAND GRANTS—Exceptions.—A homestead entry, made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not canceled until after the location, did not operate to except the land from the grant to the railroad company, under the provisions of the act of congress of March 3, 1863, donating to the State of Kansas lands to aid in the construction of certain railroads and telegraphs. — *Young v. Goss*, Kan., 22 Pac. Rep. 572.

110. LAND WARRANTS— Deeds.—If the holder of a military land warrant locates the same upon public land, and receives the usual certificate therefor, he then has the right to tranfer or sell the land; and, if he exercise such right before a patent has issued to him, the patent inures to the benefit of his grantee.— *Stinson v. Geer*, Kan., 22 Pac. Rep. 586.

111. LANDLORD AND TENANT.— The lessor is bound, from the very nature of his contract, to cause the lessee to be maintained in the peaceable possession of the property during the term of the lease.—*Pacific Exp. Co. v. Haven*, La., 6 South. Rep. 650.

112. LANDLORD AND TENANT—Use and Occupation.— Where a party occupies premises as a tenant, upon an uncertain tenure, and suit is brought to recover for use and occupation for the time occupied, the rule applicable to the case is, what was the fair rental value of the premises as occupied, under all the circumstances of the case? And it is competent for the defendant to prove the rental value for the time so occupied.—*Cohoon v. Kineon*, Ohio, 22 N. E. Rep. 722.

113. LEASE—Statute of Frauds.—While a verbal lease of real property for a longer term than one year is void by the statute of frauds, so that neither party thereto can enforce its terms as against the other, yet if the lessee enter into possession of the property under the lease, and pay his rent to the lessor, who accepts the same, obligations may thereby be created in reference to the occupation of the property that will be legally binding upon the parties.—*Rosenblat v. Perkins*, Oreg , 22 Pac. Rep. 598.

114. LIFE INSURANCE—Forfeiture. — A provision in a paid up policy that the amount of notes due the company for premiums on a policy taken up in exchange for the paid-up policy shall be deducted when the insurance money is paid, and that failure to pay the interest on the notes annually shall forfeit the policy, is not unconscionable, and there is no reason for equitable relief against theforfeiture without some element of fraud, accident, or mistake.—*Fowler Mut. Life Ins. Co.*, N. Y., 22 N. E. Rep. 576.

115. LIMITATION OF ACTIONS — Payment. — Checks, signed and issued by a debtor, and received by a creditor as payments on account of a debt, are competent evidence to prove interruption of prescription after the decease of the debtor under Rev. Civil Code, art. 2278.—*McGinty v. Succession of Henderson*, La., 6 South. Rep. 658.

116. LIMITATION OF ACTIONS—Lex Fori.—Where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, not the *lex loci*, applies on the subject of limitation. — *O'Shields v. Georgia Pac. Ry. Co.*, Ga., 10 S. E. Rep. 268.

117. LOGS AND LOGGING—Liens. — A petition for a lien on logs for supplies used in cutting, hauling, and driving them, furnished by a partnership, which petition was signed by only one of the partners, who made oath in the verification that he was one of the firm, and that he made the verification in behalf of himself and his copartner, is sufficient to give the partnership a lien, though the petition claims a lien upon the logs only for the sum due "him." — *Garland v. Hickey*, Wis., 43 N. W. Rep. 832.

118. MALICIOUS PROSECUTION— Agency.—The rule that a principal is affected by notice to or the knowledge of his agent does not justify a legal imputation of actual malice in the conduct of a principal merely because of facts known only to his agent.— *Reisan v. Mott*, Minn., 43 N. W. Rep. 691.

119. MARITIME LIENS.—The lien of shipping merchants for advances made in attending to the business of a vessel at the end of her voyage takes precedence of the lien of a bottomry lender.—*The Aina*, U. S. D. C. (N. Y.), 40 Fed. Rep. 269.

120. MARRIED WOMEN—Mortgages.—Under Gen. St. S. C. §§ 2036, 2037, which gives to a married woman the power to contract and be contracted with as to her separate estate, she can mortgage the same to secure a note executed by herself for borrowed money. — *Law v. Lipscomb*, S. Car., 10 S. E. Rep. 226.

121. MARRIED WOMEN— Loans.—A married woman is liable for money borrowed by her under the representation that it was for herself, where the lenders knew nothing to the contrary.—*Schmidt v. Dean*, S. Car., 10 S. E. Rep. 228.

122. MARRIED WOMEN—Trader.— Debts incurred by a married woman in improving and cultivating her farm and raising crops, though her husband acts as her agent, are contracted in carrying on "business," within the meaning of Mansf. Dig. Ark. §§ 4624-4626, 4630, which authorize a married woman to "carry on any trade or business, and perform any labor or services on her sole and separate account," and provide that her earnings therefrom "shall be her sole and separate property;" that she may sue alone in respect thereto; and that judgments against her may be enforced against such separate property the same as against that of a *feme sole*.—*Hickey v. Thompson*, Ark., 12 S. W. Rep. 475.

123. MASTER AND SERVANT— Independent Contractor. —The rule of law is well established that where one employs a contractor, exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer is in default in selecting an unskillful or an improper person as contractor. —*State v. Swayze*, N. J., 18 Atl. Rep. 697.

124. MASTER AND SERVANT — Assumption of Risk. — Laborers employed to work under ground do not run the risk of the safety of machinery by which a bucket in which they are carried to their work is lowered, so as to bar recovery for injuries caused by defects in such machinery which are not obvious, where it is operated by another employee.— *Myers v. Hudson Iron Co.*, Mass., 22 N. E. Rep. 631.

125. MASTER AND SERVANT — Defective Machinery. — Plaintiff, a miller in defendant's employ, was injured by the giving way of a spout in the mill used for passing mill-stuffs from one part of the mill to another, but upon which plaintiff had climbed to reach to a certain place. The spout was in its proper place, and was secure for the purpose for which it was intended and plaintiff was familiar with it: *Held*, that no negligence on the part of defendant was shown. — *Schmidt v. Leistekow*, Dak., 43 N. W. Rep. 820.

126. MASTER AND SERVANT — Negligence. — Plaintiff's intestate was a trackman running a hand-car, under direction of the section boss, towards an approaching train, to which the boss had sent a signal-flag by one of the trackmen, to warn those in charge of the train of the approach of the hand car. The persons in charge of the train failed to keep a lookout, and ran into the hand-car before those in charge could get out of the way, and intestate was killed: *Held*, that the negligence of those in charge of the train caused the injury.—*Howard v. Delaware & H. Canal Co.*, U. S. C. C. (Vt.), 40 Fed. Rep. 195.

127. MASTER AND SERVANT—Negligence. — In an action against a coal company for an accident in its mine causing the death of an employee, an instruction which correctly recites the precautions which the statute requires coal-mine owners to use, and directs the jury to find defendant guilty if the accident was caused by its willful failure to comply with the "provisions of said statute, as stated in said declaration," is not prejudicial error, though some counts of the declaration do not show any violation of the statute.—*Consolidated Coal Co. v. Maehl*, Ill., 22 N. E. Rep. 715.

128. MASTER AND SERVANT— Contributory Negligence. —In an action against a railroad company for injury to a car repairer, caused by moving the car while he was repairing it, special findings to the effect that the rules of the company provided that car repairers, when working on cars standing on the main or side track, must give notice by placing a blue flag on the car, and that plaintiff did not give such notice, do not justify a refusal to enter judgment on a general verdict for plaintiff where the evidence shows that the plaintiff was injured while the car was not on either the main or side track.—*Quick v. Indianapolis, etc. R. Co.*, Ill., 22 N. E. Rep. 709.

129. MECHANICS' LIENS. — Under Laws N. Y. 1882, ch. 410, § 1813, as amended by Laws 1883, ch. 276, the defendant in an action to foreclose a mortgage, who claims under a mechanic's lien, must, in order to maintain his lien, file a notice of the pendency of such action.—*Danziger v. Simonson*, N. Y., 22 N. E. Rep. 570.

130. MECHANICS' LIENS—Constitutional Law.—The lien law of Michigan of 1887, binds a married woman's land, where the labor or materials are furnished to a contractor or subcontractor of the husband with her knowledge or consent; and furnishing labor or materials "in an open and public manner" is made sufficient evidence of knowledge and consent. It provides that the lien "shall not be defeated by any contract between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original, or any subcontractor, or by any payment made by such owner, for the contract price of such labor or material, or any part thereof:" *Held*, that it is unconstitutional as divesting the owner of property of his title without his act or default.—*John Spry Lumber Co. v. Sault Sav. Bank, Loan & Trust Co.*, Mich., 43 N. W. Rep. 978.

131. MEASURE OF DAMAGES—Contract. — Complainant contracted to cut timber, and place it in a river, in a good, workman-like manner, knowing it was to be floated to the owner's mill: *Held*, that in an action on the contract, where defendant was allowed to recoup for a portion of the timber destroyed by the negligence and unskillful work of complainant, evidence of the market value of the timber at the mill was admissible to show the measure of damages, it not appearing that there was a market value for it at the time and place it was put in the river and the mill being the point nearest thereto at which such timber had a market value.—*McDonald v. Unita Timber Co.*, Tenn., 12 S. W. Rep. 420.

132. MORTGAGE — Recoupment. — In an action by a mortgagee, in a mortgage for future advances, in pursuance of a contract, for advances made by virtue of the same, an answer which sets up a breach of the contract by way of recoupment, but which alleges no facts upon which a recovery for more than nominal damages could be sustained, and which shows a probable excuse for the breach is demurrable. — *Levy v. Sale*, Ark., 12 S. W. Rep. 474.

133. MORTGAGE—Foreclosure.—Where lands subject to incumbrance have been successively sold, in different parcels, and to different purchasers, the rule of inverse order of alienation applies to those who are *bona fide* puschasers, where their succeeding alienees had notice of the antecedent sale.—*Aderholdt v. Henry*, Ala., 6 South. Rep. 625.

134. MORTGAGES — Priority. — A mortgage given by a railroad company on all property, materials, rights, and privileges then or thereafter appertaining to the road, to secure bonds given for funds wherewith to construct it, has priority over a subsequent mortgage on the earnings of a certain section of the road given to secure money used in constructing that section by a lessee who had stipulated to construct it as one of the considerations of the lease, the priority of which subsequent mortgage the mortgagor company has argeed to recognize, as the original bond holders were under no obligation to such lessee. — *Thompson v. White Water Val. R. Co.*, U. S. S. C., 10 S. C. Rep. 29.

135. MORTGAGES—After Acquired Title.— Where one in possession, under a parol agreement to purchase, mortgages the land in pursuance of an agreement whereby a mortgage from the vendor to the mortgagee is canceled as part of the consideration of purchase, a subsequent quitclaim deed to the vendee inures to the benefit of his mortgagee as against his creditors, whose rights accrued subsequent to the deed, though the mortgage contained no covenants of warranty. — *Clark v. Daniels*, Mich., 43 N. W. Rep. 854.

136. MORTGAGE—Future Crops.—A party in possession of land under a bond for a deed can execute a valid deed of trust on the crop to be grown thereon, as such crop has a potential existence within the meaning of the law.—*Stadeker v. Loeb*, Miss., 6 South. Rep. 687.

137. MORTGAGE — Lien — Redemption. — Under Civil Code Dak. § 1714, providing that "every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before the right of redemption is foreclosed," another lienholder cannot complain of the redemption of property from a prior lien by a person interested before the claim which constitutes such prior lien is due. —*Kalscheuer v. Upton*, Dak., 43 N. W. Rep. 816.

138. MORTGAGES—Redemption.— Where conveyances, absolute on their face, are only intended as security for a debt which is also secured by chattel mortgages, but the latter are released on the parol agreement of the debtor to release his interest in the land, and it appears that the consideration for the promise is an adequate one, that the price of the land was fixed by arbitration, and that the transaction is in all respects fair, the debtor will not be allowed to invoke the statute of frauds in an action to cancel the deeds, but they will be left to carry the estate in fee as they purport to do. — *Bazemore v. Mullins*, Ark., 12 S. W. Rep. 474.

139. MUNICIPAL CORPORATION — Improvements. — An ordinance directing the improvement of a street, providing for the payment of part by general taxation,

part by street-car companies, and the rest by special taxation, and providing for the ascertaining of the amount of the special tax, to be estimated by a committee, under the provisions of article 9 of the general law for the incorporation of cities and villages, and reported to the council, sufficiently fixes the amount to be raised by special taxation. — *Green v. City of Springfield*, Ill., 22 N. E. Rep. 602.

140. MUNICIPAL CORPORATIONS — The corporate character of a city cannot be questioned collaterally by a private citizen, when it has been a *de facto* city for more than fifteen years, and a law was in force under which it might have been legally incorporated, and it was attempted to have been incorporated under the provisions of such law.—*Mendenhall v. Burton*, Kan., 22 Pac. Rep. 558.

141. MUNICIPAL CORPORATIONS — Ordinance. — Violations of municipal ordinances, punishable by fine or imprisonment, are "criminal offenses" within the meaning of article 1, § 7, of the constitution of the State, and consequently, where the prescribed punishment may exceed three months' imprisonment or $100 fine, (the limits of the jurisdiction of justices of the peace,) a person can be held to answer for them only on the indictment or information of the grand jury.—*State v. West*, Minn., 43 N. W. Rep. 845.

142. MUNICIPAL CORPORATIONS — Contracts. — A contract, duly authorized by law, made by an incorporated town or city, for useful improvements, and duly executed by the contractor, will be enforced against the city as a debt for which it is liable, if the means of payment provided in the contract should fail through subsequent events, not due to the laches or fault of the contractor.—*Cole v. City of Shreveport*, La., 6 South. Rep. 688.

143. MUNICIPAL CORPORATIONS — License. — The provision in the charter of the city of Minneapolis authorizing the city council "to license and regulate hackmen, draymen, expressmen, and all other persons engaged in carrying passengers, baggage, or freight, and to regulate their charges thereon," applies only to those who are engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle.—*State v. Robinson*, Minn., 43 N. W. Rep. 834.

144. MUNICIPAL CORPORATION— Defective Sidewalks.—In an action for injuries received in consequence of defects in a sidewalk the evidence showed that for the entire summer there had been on each side of some steps near an adjacent building a hole, 18 inches wide and 3 feet long, frequently open for a length of time, or partially and imperfectly covered with loose boards, liable to be removed or broken; that the walk was poor, and had been talked about all summer: *Held*, that the character of the defects, and the length of time for which they had existed, were such as to impute knowledge thereof to the aldermen of the ward. — *Smalley v. City of Appleton*, Wis., 43 N. W. Rep. 826.

145. MUNICIPAL CORPORATIONS — Ultra Vires.—A rapid creek, running zigzag through a city, is within municipal control; and a contract by the city for straightening it so as to conform to the direction of the streets and alleys is not *ultra vires*, where general power is given by the city charter to drain, improve, and repair the streets and alleys, without prescribing the manner of exercising such power. — *McGuire v. City of Rapid City*, Dak., 43 N. W. Rep. 706.

146. MUNICIPAL CORPORATIONS — Ultra Vires. — The power to contract inheres in every corporation, and is co-extensive with its corporate powers. The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.—*Portland Lumbering, etc., Co. v. City of East Portland*, Oreg., 22 Pac. Rep. 536.

147. MUTUAL BENEFIT INSURANCE—Sale of Certificates. —Where the rules of a mutual benefit society forbid the transfer of its benefit certificates for a valuable consideration, a contract for the sale of such certificate to one who has no insurable interest in the life of the assured is void under that rule, as well as being against public policy.—*Stoelker v. Thornton*, Ala., 6 South. Rep. 680.

148. MUTUAL BENEFIT INSURANCE — Assignment. — A provision in the insurance certificate of a mutual benefit society that "this certificate may be assigned, transferred, or set over, by and with the consent of the association, granted by its president or secretary," does not authorize an assignment by the insured, but by the beneficiary only.—*Block v. Valley Mut. Ins. Ass'n.*, Ark., 12 S. W. Rep. 477.

149. NAVIGABLE WATERS. — Under Code Tenn. §§ 1439, 1524, providing for the erection of mill-dams across waters not navigable in the proper, legal, or ordinary sense, a stream is not navigable which is not of sufficient depth naturally for valuable floatage, such as rafts, flat-boats, and small vessels of lighter draft than ordinary.—*Irwin v. Brown*, Tenn., 12 S. W. Rep. 340.

150. NEGLIGENCE — Exemplary Damages — Railroad Companies.—In Louisiana, the doctrine of exemplary or punitory damages, as applicable to common carriers, is not yet definitely sanctioned. — *Rutherford v. Shreveport, etc. R. Co.*, La., 6 South. Rep. 644.

151. NEGLIGENCE OF CHILDREN.—In an action for personal injury resulting in the death of a boy under the age of 14 years, it is the duty of the court, without being requested, to instruct the jury that a different rule should be applied in considering the question of contributory negligence from that applicable in the case of an adult.—*Wright v. Detroit, etc. Ry. Co.*, Mich., 43 N. W. Rep. 765.

152. NEGLIGENCE—Principal and Agent.—The plaintiff, an employee of a railroad company, having been injured while coupling cars, an agent sent by the company to obtain from the plaintiff a statement of the circumstances of the accident is not authorized by such agency to bind the company by his own declarations as to such circumstances. Proof of such declarations would be mere hearsay evidence. — *Doyle v. St. Paul, etc. Ry. Co.*, Minn., 43 N. W. Rep. 787.

153. NEGLIGENCE—Degrees.—In an action for damages for injuries suffered on defendant's railway, a charge drawing the attention of the jury to the comparative negligence of plaintiff and defendant, and directing them to find for plaintiff if they found the injury was caused by the greater negligence of defendant, is error. —*East Tennessee, etc. Ry. Co. v. Hull*, Tenn., 12 S. W. Rep. 419.

154. NEGOTIABLE INSTRUMENTS — Evidence. — In an action on a note alleged in the petition to have been executed and delivered to plaintiffs by defendants, a note shown to have been executed and delivered by defendants to a third person, and by him indorsed to plaintiffs, is inadmissible in evidence.— *Sweetzer v. Claflin*, Tex., 12 S. W. Rep. 395.

155. NEGOTIABLE INSTRUMENTS — Bona Fide Holder.—According to the Code, § 2790, the purchaser of negotiable paper before due is affected with notice by any circumstances which would place a prudent man upon his guard in making the purchase.—*Phillips v. Loyd*, Ga., 10 S. E. Rep. 232.

156. NEGOTIABLE INSTRUMENT — Accommodation Paper.—It is competent, with some partial exceptions in particular cases, to show by parol that the consideration, as stated in a sealed instrument, was not paid or received, or that it was greater or less or different from that expressed. This may be done for any purpose except to impeach or destroy the contract. — *Pray v. Rhodes*, Minn., 43 N. W. Rep. 838.

157. PARENT AND CHILD—Custody.—Though the father be a man of good character and repute, and now capable of supporting the child, the court, in the exercise of its discretion, was justified in remanding her to the custody of the respondents; who had cared for her

since she was six years of age, and that the exercise of such discretion was not inconsistent with Rev. St. § 3964. —*Sheers v. Stein*, Wis., 43 N. W. Rep. 728.

158. PARTITION—Ferries.—The owner of an undivided interest in a ferry, including both franchise and landings, may bring a bill for partition of the entire property.—*Rohn v. Harris*, Ill. 22 N. E. Rep. 587.

159. PARTNERSHIP—Set-off.—Where money is not deposited with a firm, but with one of the partners individually, and as a special bailee, and is not mixed up with the partnership funds, but kept separately in his possession, it constitutes only a personal liability, and cannot be set off, in an action by the surviving partner, on a demand due the partnership.—*Edwards v. Parker*, Ala., 6 South. Rep. 684.

160. PARTNERSHIP REALTY — Surviving Partner. — As real estate belonging to a firm is liable for the debts of the firm when the personal property proves insufficient, and such real estate is regarded in equity as personal property on the death of a partner, if the personal property is not sufficient to pay all the firm debts, and it is necessary to sell the real estate to pay them, the surviving partner has the right to sell and convey the same; and if he sells and conveys in good faith, for a valuable consideration, without an order of court, he passes an equitable title.—*Walling v. Burgess*, Ind., 22 N. E. Rep. 419.

161. PLEADING—Declaration.—The declaration, when taken as a whole, showing that the suit was for services not actually rendered, but which the plaintiff was ready to render, to the defendant, under a contract of employment, but not alleging that the contract was made with or by defendant, or that the plaintiff was wrongfully discharged, or that he objected to taking a rest when notified that he might do so, no cause of action is set forth, and there was no error in dismissing the action for that reason, on general demurrer to the declaration. —*Saunders v. Atlanta & F. R. Co.*, Ga., 10 S. E. Rep. 266.

162. PRACTICE IN CIVIL CASES.—A special verdict found nothing due plaintiffs by defendant, and found for defendant on a counter-claim: *Held*, that refusal by the trial court of a motion to enter judgment for plaintiffs for the amount of their claim, less the counter-claim, would not be disturbed on appeal, though the finding against plaintiffs was not supported by the evidence, where plainitffs did not move to set aside any part of the special verdict.—*Schweickhart v. Stuewe*, Wis., 43. N. W. Rep. 722.

163. PRINCIPAL AND AGENT.—Authority to an agent to sell goods does not, of itself and alone, apparently give to the agent authority to collect pay for the goods thus sold.—*Kane v. Barstow*, Kan., 22 Pac. Rep. 588.

164. PROCESS—Service.—Code Civil Proc. Dak. § 104, is not complied with by affidavit stating that defendant cannot after due diligence, be found in the territory, and that affiant does not know, and cannot by reasonable diligence learn, her residence or wherabouts, as it does not appear that any effort has been made to find defendant in the territory.—*Beach v. Beach*, Dak., 43 N. W. Rep. 701.

165. QUIETING TITLE.—A bill to remove a cloud from the title to land cannot be brought when the person whose claim constitutes the alleged cloud is in possession.—*McDonald v. White*, Ill., 22 N. E. Rep. 599.

166. RAILROAD COMPANY — Stock Killing. — Railroad grounds on right of way of a railway company, and not located on a highway, there being neither station, station agent, depot building, nor platform for receiving and discharging freight or passengers, but only a side track used for the convenience of loading and unloading a single commodity are not depot grounds, within the meaning of the statute exempting the company from liability for failure to fence such property.—*Jaeger v. Chicago, etc. Ry. Co.*, Wis., 43 N. W. Rep. 732.

167. RAILROAD IN STREET.—In plaintiff's petition it was alleged that a railroad company built its tracks over a street of a city of the second class in such a way as to render the street wholly useless to him as a means of access to and from his lots which abutted on the street; that shortly afterwards the railroad and franchises of that company were sold under a decree of foreclosure to another company, which company has since operated the road, and has continued the obstruction and nuisance, and thereby permanently deprived him of all access to the street from his property: *Held*, that a cause of action was stated in favor of the plaintiff against the purchasing company.—*Ft. Scott, etc. Ry. Co. v. Fox*, Kan., 22 Pac. Rep. 583.

168. RECEIVER—Appeal.—An order requiring a receiver to join an administrator in the sale of certain property in which the estate had an interest, and which was in the hands of such receiver, is not an appealable order.—*Steele v. Holladay*, Or., 22 Pac. Rep. 535.

169. REMAINDERS—Deed.—A deed which creates a life-estate in the grantee, and provides that after his death the title in fee simple shall "go and vest in his children and heirs at law equally, to be divided between them as tenants in common," creates a vested remainder in the children of the grantee in being at the time of its execution; and as the words "children and heirs at law," as used therein, constitute a class, the estate in remainder will open, and let in such of the same class as come into being during the continuance of the particular estate, who likewise take a vested remainder.—*Waddell v. Waddell*, Mo., 12 S. W. 349.

170. REMOVAL OF CAUSES — Citizenship. — Under removal act Cong. 1888, § 2, cl. 2, providing for the removal of causes where the controversy is between citizens of different States, a defendant sued in a court of his own State cannot remove the cause to a federal court.—*Schofield v. Domorest*, U. S. C. C. (N. Y.,) 40 Fed. Rep. 273.

171. RES ADJUDICATA.—A judgment for the defendant, upon a plea of want of consideration, in an action by the indorsee of a promissory note against the maker, is a bar to a subsequent action, in another State, by the payee against the maker.—*Leslie v. Bonte*, Ill., 22 N. E. Rep. 594.

172. RES JUDICATA—Decree.—Where a question of law or fact is once definitely settled and determined by a decree of this court, and the cause is remanded for further proceedings, a party to said suit cannot by subsequent pleadings call in question the conclusiveness of the questions determined by said decree.—*Seabright v. Seabright*, W. Va., 10 S. E. Rep. 265.

173. RES ADJUDICATA.—Where judgment of foreclosure is taken by default against the minor heirs of a married woman, on a mortgage given by her, the question whether the debt secured was wholly her own, or partly her husband's, is *res adjudicata*, and cannot afterwards be raised by the heirs for the purpose of attacking the judgment.—*Faust v. Faust*, S. Car., 10 S. E. Rep. 262.

174. SALE—Warranty.—Defendants gave a writted order for a threshing machine, containing an express warranty that the separator was capable of doing a good business in threshing, and that the engine was well made, and, when properly run, was capable of driving the separator to do good business in threshing: *Held*, that in an action on the purchase-money notes, parol evidence was inadmissible to show that the seller was informed that defendants were going into the threshing business on an extensive scale, in a country where engines larger than the one in controversy were used, and that he verbally warranted that the engine would do the work. — *Nichols, Shepard & Co. v. Crandall*, Mich., 43 N. W. Rep 877.

175. SALE—Failure to Accept.—In an action for refusing to receive the balance of a quantity of rags pursuant to a contract, in which they were stipulated to be of a certain quality, where defendant alleges that those which had been delivered were inferior, the burden is on the plaintiff to show that they were of the quality contracted for.—*Simons v. Ypsilanti Paper Co.*, Mich., 43 N. W. Rep. 864.

176. SALE—Warranty.—If an order be given to a manufacturer or dealer for a specific article of a known recognized kind and description, and if the defined and

described thing be actually supplied there is no implied warranty that it will answer the purpose for which it is intended to be used.—*Gould v. Brophy*, Minn., 43 N. W. Rep. 834.

177. SCHOOL OFFICERS.—Where two persons are duly elected assessor and moderator, and tender their acceptance and bonds to the proper officer, but are prevented by a conspiracy between him and the officers whose places they are elected to from qualifying, they become thereby lawful officers; and one appointed by them as school director to fill a vacancy, who qualifies, becomes director, and is entitled to the papers belonging to that office. —*Culver v. Armstrong*, Mich., 43 N. W. Rep. 776.

178. SCHOOLS AND SCAOOL-DISTRICTS—Incorporation. —Under Pol. Code Dak. 1877, c. 40 § 10, a petition by a majority of the citizens of the districts affected is a condition precedent to the incorporation by the superintendent of a new school district. — *Dartmouth Sav. Bank v. School Dists.*, Dak., 43 N. W. Rep. 822.

179. SLANDER.—Where defendant charges plaintiff with forging a person's name to a note, the natural meaning conveyed is that the note was susceptible of forgery, and the words are actionable *per se*.—*Beneway v. Thorp*, Mich., 43 N. W. Rep. 863.

180. SLANDER—Repetitions.—In an action for a slander by reason of which plaintiff's workmen left his employment, where there is no direct evidence that defendant told the workmen the story, their declarations as to their reasons for leaving, made at the time, are immaterial, since the fact that defendant told them cannot be inferred from the identity of form of the story as told by him and the workmen's belief.—*Elmer v. Fessenden*, Mass., 22 N. E. Rep. 635.

181. SPECIFIC PERFORMANCE.—The equitable considerations which will justify a court in refusing to compel specific performance of a valid contract to convey real estate must have some reference to or some connection with the contract itself, or the duties of the parties in relation to it.—*Thompson v. Winter*, Minn., 43 N. W. Rep. 796.

182. SPECIFIC PERFORMANCE.—Where in a suit to compel the conveyance of land, it appears that complainant's wife deeded the land to defendant's ancestor; that the latter never exercised any acts of ownership over it, and admitted that he held it in trust for complainant; and there is no proof that he paid any consideration for his deed,—a decree ordering conveyance will be affirmed.—*Holderman v. Gray*, Ill., 22 N. E. Rep. 592.

183. SPECIFIC PERFORMANCE— Part Performance. —A parol modification of the written contract, which is within the statute of frauds, is not validated by a part performance of the written contract, consisting of the platting of land included therein.—*Butty v. Colton*, Dak., 43 N. W. Rep. 717.

184. STOCK KILLING CASES—Presumption.—Code Civil Proc. Dak. § 679, providing that the killing of a horse or any stock by a train along a railroad shall be *prima facie* evidence of the negligence of the railroad company, creates no new liability, but merely changes the order of proof; and recovery cannot be had in an action where there is unrebutted evidence that the railroad company was not negligent.—*Huber v. Chicago, etc. Ry. Co.*, Dak , 43 N. W. Rep. 819.

185. TAXATION—Curative Acts.—Certain requrements are absolutely essential to a valid exercise of the taxing power, without which no valid tax-sale could be made. These are stated. A statute dispensing with such essentials, or attempting to heal the defect of compliance therewith, could not stand.—*In re Douglass*, La., 6 South Rep. 675.

186. TAXATION — Railroad Company. — Payment of a percentage on their gross earnings by the railway companies, which own all the stock and use the terminal facilities of the depot company, constitutes payment of taxes on all the property of the latter.—*State v St Paul Union Depot Co*,. Minn., 43 N. W. Rep. 840.

187. TAXATION.—Assessment.—Where it is sought to enjoin the collection of taxes illegally assessed, it is not incumbent on complaint, before filling his bill, to tender what is equitably due for taxes, as a condition of relief. —*Ball v. City of Meridian*, Miss., 6 South. Rep. 645.

188. TAXATION — Exemption.—Rev. St. Ill. c. 120, § 2, which exempts from taxation all public buildings belonging to any county, does not apply to a special tax levied by a city upon a county court-house to defray the cost of paving the street in front of such courthouse.—*Adams County v. City of Quincy*, Ill., 22 N. E. Rep. 624.

189. TAXATION — Equalization. — Act Tenn. March 25, 1887, provides that the board of equalization shall examine and compare and equalize the assessments, etc., and hear and adjust complaints, when in their judgment justice demands, and their action as to valuation shall be final. It provides that all complaints shall be heard from the first to the third Monday in June. It also provides that if the complaint is based on excessive values the board shall have the right to summon before them witnesses, and the testimony of three will be sufficient evidence on which the board may act: *Held*, that no appeal would lie from the decision of the board in such case.—*Tomlinson v. Board of Equalization*, Tenn., 12 S. W. Rep. 414.

190. TAX TITLES—Trespasser.—As against a trespasser, the plaintiff in petitory action is not bound to show title perfect against the world. He cannot take advantage of any defects in the muniments of title exhibited by plaintiff. An apparently good title exhibited by plaintiff. An apparently good title is sufficient against him. —*Stille v. Schull*, La., 6 South Rep. 634.

191. TENANCY IN COMMON—Partnership.—The right of plaintiff to have set aside a deed procured from him by his co-tenant by frand, and his right to demand an accounting for personalty, the assets of a former partnership between them, of which the latter is in possession, are separate causes of action, and are not made one by the fact that defendant by the same fraud by which he deprived plaintiff of his real estate, attempted to deprive him of his interest in the partnership assets.—*Holloway v. Holloway*, Mo., 12 S. W. Rep. 460.

192. TRADE-MARK.—The right of a person to use his name as a brand on manufactures, the words used in connection with his name being words of common use, is a personal right, and does not pass to his assignee in bankruptcy.—*Matingly v. Stone*, Ky., 12 S. W. Rep. 467.

193, TRIAL—Verdict—Amendment.—In an action on a promissory note and an account stated, where the plea is *non assumpsit* and set-off, a verdict "for plaintiff," without stating for what amount, is fatally defective; and after it has been recorded, and the jury has separated, cannot be amended by the court.—*Gaither v. Wilmer*, Md., 18 Atl. Rep. 590.

194. TRIAL—Reading Pleadings.—In an action against a railroad company for injuries to a passenger, when defendant in its answer denies information as to certain allegations in the complaint, and afterwards stipulates that it will admit its liability "for damages in consequence of the fall of the railroad bridge, thus narrowing the issues to the plaintiff's injury, and the amount of damages suffered by her," it is proper for the plaintiff's attorney, in summing up, to read portions of the answer, and comment thereon as showing what facts were admitted.—*Tisdale v. Delaware & Hudson Canal Co.*, N. Y., 22 N. E. Rep. 700.

195. TROVER—Evidence.—In trover to recover sheep, which plaintiff claims under mortgage from defendant's son, given to secure the purchase money, evidence that defendant offered a note in payment of his son's indebtednes on such sheep, it not appearing that he owed his son anything which he was authorized to apply to such payment is immaterial.—*Wright v. Starks*, Mich., 43 N. W. Rep. 868.

196. TROVER—Exemption.—Where it appears that the property sought to be recovered in trover had been exempted from levy and sale, and set apart to plaintiff as the head of a family an affidavit by defendant that

he purchased the property in good faith, at a judicial sale, and that plaintiff received the surplus of the proceeds, in support of his motion to set aside a verdict judgment for plaintiff, on the ground of defendant's providential absence from the trial, is not sufficient, as it does not show such facts as render it improbable that plaintiff would be entitled to recover, no title passing to defendant by the sale of such exempted property.—*Phillips v. Taber*, Ga., 10 S. E. Rep. 270.

197. USURY—Intent.—Where there is evidence that excessive interest was not contracted for, and arose only through inadvertence in the insertion of a wrong date of maturity, it is error to instruct that a contract is usurious if its effect is that one realizes more than the legal interest, as it excluded the question of intention, which is necessary to constitute usury.—*Smythe v. Allen*, Miss., 6 South Rep. 627.

198. VENDOR AND VENDEE—Contracts. — Under a contract for the purchase of an interest in real estate, to the larger part of which titles were admitted to be imperfect, reserving to the purchaser the privilege of making "a further investigation of the condition of the property aforesaid, and if, upon such examination, it is not found satisfactory, and that the representations as made by the parties of the first part are substantially correct, the said purchaser has the privilege of declaring said contract null and void" by giving notice within a certain time, it is for the purchaser alone to determine whether he shall complete the purchase, and his right to refuse to complete it is not affected by any action of his in pursuance of another and independent provision of the same contract, that all of the parties thereto shall have the option of taking a *pro rata* share of land subsequently purchased by any of them.— *Giles v. Paxson*, U. S. C. C. (Iowa), 40 Fed. Rep. 283.

199. VICIOUS ANIMALS—Injuries. — A complaint under Laws N. Y. 1872, ch. 776, which makes it unlawful for cows to run at large in any public place, alleging that defendants' cow was carelessly permitted to run at large on a public highway, where she knocked plaintiff down, is answered by showing that while defendant's servant was lawfully leading the cow through the streets she was set upon by dogs, and escaped from his control, and while so at large inflicted the injury. — *Moynahan v. Wheeler*, N. Y., 22 N. E. Rep. 702.

200. WATER AND WATER-COURSES—Surface Water.—The rule that a land-owner may improve his own land for the purpose for which similar land is ordinarily used, and may do what is necessary for that purpose,—as, to build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water that would otherwise remain there, or to shed surface water over land on which it would not otherwise go,—applied to a railroad company constructing its road across a prairie country. —*Jordan v. St. Paul, etc. Ry. Co.*, Minn., 43 N. W. Rep. 849.

201. WATERS AND WATER-COURSES — Injunction. — Where the waters of a stream have been diverted through an artificial channel by defendants and their grantors, and so used by them continuously for more than forty years, they will be restrained from restoring the waters to the original channel, to the detriment of the lands lying thereon below the point of diversion.— *Matheweon v. Hofman*, Mich., 43 N. W. Rep. 879.

202. WILL—Charges on Land.— In construing a will, in order to justify a finding that there was an intent to make a charge upon the real estate, such intent must appear from express directions or be clearly gathered from the provisions of the will.— *Clift v. Moses*, N. Y., 22 N. E. Rep. 393.

203. WILL—Testamentary Capacity. — Under Rev. St. Ill. ch. 148, § 1, the degree of mental vigor required varies according to the circumstances of the testator; and in a suit to set aside a will disposing of a large estate to which there were many heirs it is error to instruct the jury that the fact that the testator's mind "was impaired by age or disease, if not to the point of lunacy or absolute imbecility," would not take away his legal capacity to make a will. — *Campbell v. Campbell*, Ill., 22 N. E. Rep. 620.

204. WILL—Tenants in Common.—Where a will devises land to one person for life, and directs that at his death it shall be sold, and the proceeds divided between certain persons, but names no executor, and makes no other provisions as to the sale of the land, the persons to whom the proceeds are given become tenants in common of the land upon the death of the life tenant.— *Bowen v. Swander*, Ind., 22 N. E. Rep. 725.

205. WILLS—Annuities—Rent Charge. — As the devise to the testator's children was of a yearly sum, to be paid by the trustee out of the net rents of the realty in his possession, and devised to him upon uses, it was merely an annuity, and not a devise of rents issuing out of land, which would call for the application of the rule that a devise of rents is a devise of the land itself. —*De Haven v. Sherman*, Ill., 22 N. E. Rep. 711.

206. WILLS—Trusts.—Testatrix directed her executors to provide for the maintenance of her daughter during minority, and thereafter pay her yearly a certain sum until she attained the age of 35; and directed them to manage the estate until she attained that age, when it was to be transferred to her absolutely. In case of the death of the daughter prior to attaining that age the property was to go to her issue, on the same trusts, and upon their death to testatrix's husband, if he was living: *Held*, that upon the death of the husband the daughter was entitled to the possession of the property freed from the trust, though she had not attained the age of 35.—*Bennett v. Chapin*, Mich., 43 N. W. Rep. 893.

207. WILLS—Lapsed Legacies.—Mill. & V. Code Tenn. § 3036, provides that "whenever a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, said issue shall take the estate devised or bequeathed as the devisee or legatee would have done, had he survived the testator," etc: *Held*, that the statute applied only to cases where a devisee or legatee died leaving issue, and not to every case where such person dies before testator.—*Dixon v. Cooper*, Tenn., 12 S. W. Rep. 415.

208. WILLS — Per Capita. — Under a will devising decendent's estate to her son, to four children of her deceased daughter, and to one son of another deceased daughter, to be divided as follows, "one-third to my son, and two-thirds to the said children of my said deceased daughters" followed by a clause bequeathing five dollars to another granddaughter, these being the only living children and grandchildren, the last-mentioned granddaughter is entitled to five dollars, the decedent's son to one third of the estate left, and the remaining two-thirds should be divided among the rest *per capita*.—*Wells v. Hutton*, Mich., 43 N. W. Rep. 768.

209. WITNESS—Transactions with Decedents. — In an action by an administrator against a person to whom the intestate had disposed of his property before his death, where the plaintiff produces in evidence certain answers of defendant, in an examination in the probate court, as to his disposition of the property in dispute, the defendant may introduce so much of his testimony given upon such examination as he may deem material, notwithstanding it would otherwise be inadmissible under How. St. Mich. § 7545. — *Beardslee v. Reeves*, Mich., 43 N. W. Rep. 677.

210. WITNESS— Impeachment. — Gen. St. Conn. § 1098, which provides that no person shall be disqualified as a witness by reason of his conviction of a crime, but such conviction may be shown for the purpose of affecting his credit, authorizes only such convictions to be shown as formerly disqualified the convict from testifying, and not a conviction by a justice's court of simple assault.—*Card v. Foot*, Conn., 18 Atl. Rep. 713.